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Supreme Court of the United States

SALIM AHMED HAMDAN,

PETITIONER,

V.

ROBERT M. GATES, ET AL.,

RESPONDENTS

On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for The District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

This case presents a question also presented by the petitions for certiorari granted in *Boumediene v. Bush*, No. 06-1195, and *Al Odah v. United States*, No. 06-1196:

1. Do detainees at the Guantanamo Bay Naval Base in Cuba have access to habeas corpus under the Constitution or by statute?

In addition, this case presents two further questions, which make it a logical and necessary companion to *Boumediene* and *Al Odah*:

2. Is the Military Commissions Act of 2006 ("MCA"), which purports to strip federal courts of habeas jurisdiction with respect to Guantanamo Bay detainees, unconstitutional because it violates separation of powers, the Bill of Attainder Clause, and Equal Protection guarantees?

3. Even if the MCA validly withdraws habeas jurisdiction over petitions filed by individuals detained as alleged enemy combatants, is the petitioner in this case, who faces a criminal *prosecution* before a military tribunal and sentence of life imprisonment, nevertheless protected by fundamental rights secured by the Constitution, including the right to challenge the jurisdiction of such a tribunal via the writ of habeas corpus?

CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

REASONS FOR GRANTING THE PETITION 5

I. The Questions Presented Are Exceptionally Important and Require Immediate Determination. 5

II. This Case Serves as a Necessary Counterpart to Cases in Which This Court Has Granted Certiorari. 9

III. The Court Below Erred in Creating a Legal Black Hole at Guantanamo Exempt from the Great Writ. 13

IV. The MCA Is Unconstitutional. 23

V. The Federal Courts Retain Statutory Jurisdiction To Consider Hamdan's Petition. 28

CONCLUSION 30

Appendix A (District Court opinion, Dec. 13, 2006) 1a

Appendix B (constitutional provisions) 17a

Appendix C (statutory provisions) 18a

Appendix D (notice of appeal, filed Feb. 5, 2007) 30a

Appendix E (Hamdan's charges, filed May 10, 2007) 32a

Appendix F (Lord Goldsmith's speech, Feb. 12, 2007) 45a

Appendix G (Circuit Court opinion, filed Feb. 20, 2007) 52a

Appendix H (Certiorari denied in *Hamdan v. Gates* et al.) 103a

Appendix I (Certiorari granted in *Boumediene v. Bush* and *Al Odah v. United States*) 116a

TABLE OF AUTHORITIES

Cases

Balzac v. Porto Rico, 258 U.S. 298 (1922)..... 20
Bolling v. Sharpe, 347 U.S. 497 (1954)..... 12
Bourn's Case, 79 Eng. Rep. 465 (K.B. 1619)..... 15
Brown v. Bd. of Educ., 344 U.S. 1 (1952)..... 12
Carafas v. LaVallee, 391 U.S. 234 (1968)..... 24
Clark v. Jeter, 486 U.S. 456 (1988)..... 24
Cook v. United States, 288 U.S. 102 (1933)..... 23
Cooper v. Aaron, 358 U.S. 1 (1958)..... 30
Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990)..... 24
Cummings v. Missouri, 71 U.S. 277 (1866)..... 27
Dames & Moore v. Regan, 453 U.S. 654 (1981)..... 7
Douglas v. California, 372 U.S. 353 (1963)..... 24
Downes v. Bidwell, 182 U.S. 244 (1901)..... 19
Duncan v. Kahanamoku, 327 U.S. 304 (1946).....16, 27
Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807)..... 23
Ex Parte Garland, 71 U.S. 333 (1866)..... 27
Ex parte Quirin, 317 U.S. 1 (1942)..... 7
Ex parte Royall, 117 U.S. 241 (1886)..... 21
Felker v. Turpin, 518 U.S. 651 (1996)..... 13
Fetters v. United States, 283 U.S. 812 (1931)..... 8
Goldswain's Case, 96 Eng. Rep. 711 (C.P. 1778)..... 23
Graham v. Richardson, 403 U.S. 365 (1971)..... 24
Gratz v. Bollinger, 539 U.S. 244 (2003).....10, 12
Greene v. McElroy, 360 U.S. 474 (1959)..... 12
Griffin v. Illinois, 351 U.S. 12 (1956).....24, 25
Grutter v. Bollinger, 539 U.S. 306 (2003)..... 12
Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).....passim

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 6, 9
Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 24
In re Bonner, 151 U.S. 242 (1894) 22
In re Griffiths, 413 U.S. 717 (1973) 24
In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) 9
In re Yamashita, 327 U.S. 1 (1946) 16
INS v. St. Cyr, 533 U.S. 289 (2001) ..... passim
Ins. Group v. Denver & Rio Grande W. R.R., 329 U.S. 607 (1947) 8
Johnson v. Eisentrager, 339 U.S. 763 (1950) ..... passim
Jones v. Cunningham, 371 U.S. 236 (1963) 22
Joy v. St. Louis, 138 U.S. 1 (1891) 8
King v. Cowle, 97 Eng. Rep. 587 (K.B. 1759) 15
King v. Overton, 82 Eng. Rep. 1173 (K.B. 1668) 15
King v. Salmon, 84 Eng. Rep. 282 (K.B. 1669) 15
King v. Schiever, 97 Eng. Rep. 551 (K.B. 1759) 14, 23
Kinsella v. Krueger, 351 U.S. 470 (1956) 7, 12
Laverty v. Duplessis, 3 Mart. (o.s.) 42 (La. 1813) 15
Lindh v. Murphy, 521 U.S. 320 (1997) 28
Lockington's Case, Bright. (N.P.) 269 (Pa. 1813) 15
Loving v. United States, 517 U.S. 748 (1996) 7
Ludecke v. Watkins, 335 U.S. 160 (1948) 23
Mali v. Keeper of the Common Jail, 120 U.S. 1 (1887) 23
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 26
McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963) 7

New Haven Inclusion Cases, 399 U.S. 392 (1970) 12
Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 27
Ocampo v. United States, 234 U.S. 91 (1914) 20
Opinion on the Writ of Habeas Corpus, 97 Eng. Rep. 29 (H.L. 1758) 15
Piedmont & N. Ry. v. ICC, 280 U.S. 469 (1930) 8
Piedmont & N. Ry. v. ICC, 286 U.S. 299 (1932) 8
Pierce v. Carskadon, 83 U.S. 234 (1872) 27
Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 26
Porter v. Dicken, 328 U.S. 252 (1946) 12
Porter v. Lee, 328 U.S. 246 (1946) 12
Preiser v. Rodriguez, 411 U.S. 475 (1973) 22
Rasul v. Bush, 542 U.S. 466 (2004) ..... passim
Reid v. Covert, 351 U.S. 487 (1956) 12
Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936) 12
Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1949) 25
Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006) 26
Schlesinger v. Councilman, 420 U.S. 738 (1975) 21
Selective Serv. Sys. v. Minn. Pub. Interest Rsch. Group, 468 U.S. 841 (1984) 26
Smith v. Bennett, 365 U.S. 708 (1961) 13
St. Louis, Kansas City & Col. R.R. v. Wabash R.R., 217 U.S. 247 (1910) 8
Swain v. Pressley, 430 U.S. 372 (1977) 14
Taylor v. McElroy, 360 U.S. 709 (1959) 12

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U.S. Pet. for Cert. Before J., *United States v. Fanfan*, No. 04-105, *cert. granted*, 125 S. Ct. 12 (2004) 6

United States v. Brown, 381 U.S. 437 (1965) 26, 27

United States v. Butler, 297 U.S. 1 (1936)) 13

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United States v. Klein, 80 U.S. 128 (1871) 10, 25, 26

United States v. Lovett, 328 U.S. 303 (1946) 27

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United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 19, 20

Wainwright v. Sykes, 433 U.S. 72 (1977) 22

Wilson v. Girard, 354 U.S. 524 (1957) 7

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Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 7, 20

Statutes

10 U.S.C. § 948(c),(d) 2

10 U.S.C. § 950j(b) 3

28 U.S.C. § 2241 28

Detainee Treatment Act of 2005 ..... 3, 22

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ..... passim

Constitutional Provisions

U.S. Const. Art. I, § 9, cl. 2 13

Other Authorities

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Salim Hamdan petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the district court in Petitioner Hamdan's case with respect to which a writ of certiorari before judgment is sought (App. A, *infra*) is reported at 464 F. Supp. 2d 9 (2006).

JURISDICTION

The judgment of the district court was entered on December 13, 2006. *See* App. A, *infra*, at 1a. Petitioner timely filed his notice of appeal (App. D, *infra*) on February 5, 2007. The case was docketed in the court of appeals on February 6, 2007, as No. 07-5042. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e). This Court denied Mr. Hamdan's joint Petition for Certiorari Before Judgment and Petition for Certiorari with another detainee on April 30, 2007. As Petitioner has confirmed with the Clerk's Office of the Court, this second Petition satisfies the rules governing Petitions for Certiorari Before Judgment.[1]

RELEVANT LEGAL PROVISIONS

The relevant legal provisions are reproduced in Appendix C.

STATEMENT

Respondents have detained Petitioner at the Guantanamo Bay Naval Base, deemed him to be an "enemy combatant," charged him with "Conspiracy" and "Providing Material Support for Terrorism," and plan to try him before a military commission. On a previous appeal, when Hamdan faced essentially the same "Conspiracy" charge, this Court held that his claims under the Geneva Conventions and Uniform Code of Military Justice ("UCMJ") were meritorious. However, upon

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[1] In a separate document filed today, Mr. Hamdan asks the Court to rehear the denial of certiorari in that case. Either procedural vehicle will permit the Court to hear his case. Should the Court wish, it may also treat this filing as a Petition for an Extraordinary Writ under 28 U.S.C. 1651(a). *Cf. In re Yamashita*, 326 U.S. 694 (1945).

remand, the district court held that Congress has now stripped it of jurisdiction to consider Hamdan's habeas petition.

1. Over five years ago, indigenous forces seized Petitioner Hamdan in Afghanistan while he was attempting to evacuate his family to Yemen, his native land. He was turned over to U.S. military personnel in exchange for a bounty, interrogated for months, and then brought to Guantanamo Bay.

2. In July 2003, over one year after Hamdan was transferred to Guantanamo, the President asserted that Petitioner was subject to his November 13, 2001 Military Order. Hamdan was placed in solitary confinement and military defense counsel was appointed for the purpose of negotiating a guilty plea. The demand by Hamdan that charges be preferred and a speedy trial held under the UCMJ was rejected. He remained in solitary confinement for ten months, until October 2004.

3. Meanwhile, in April 2004, Hamdan's military counsel filed a petition for a writ of habeas corpus in federal district court. In July 2004, Hamdan was finally charged with a single count of conspiracy. Ultimately, in June 2006, this Court ruled that Petitioner could not be tried by military commission. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). This Court held that the Geneva Conventions applied because the jurisdictional statute for military commissions incorporated the laws of war, that Common Article 3 applied in the armed conflict in which Hamdan was captured, and that it entitled him to trial by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* at 2795. A plurality of the Court also held that conspiracy is not a cognizable offense under the laws of war. *Id.* at 2775-86.

4. The President signed the MCA into law on October 17, 2006. Pub. L. No. 109-366, 120 Stat. 2600. Under the MCA, alien detainees designated as "unlawful enemy combatants" by Combatant Status Review Tribunals ("CSRTs") are subject to trial by military commission. MCA § 3(a) (adding 10 U.S.C. § 948(c),(d)). CSRT determinations are "dispositive for purposes of jurisdiction for trial by military commission." *Id.*

In addition, the MCA purports to strip jurisdiction over any habeas action brought by an alien "determined by the United States to have been properly detained as an enemy combatant

or...awaiting such determination." MCA § 7(a). Nor may the courts hear "any other action against the United States or its agents relating to any aspect of the detention, transfer, trial, or conditions of confinement" of such an alien, except for a limited review allowed under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (2005) ("DTA"). *Id.* A separate MCA provision strips jurisdiction over claims relating to "the prosecution, trial, or judgment" of a commission. MCA § 3(a) (adding 10 U.S.C. § 950j(b)).

The MCA only allows for a narrow, *post hoc* review of a subset of defendant claims before the D.C. Circuit. Only after military commission proceedings are finalized (with no timetable for such finalization) may the D.C. Circuit consider "whether the final decision was consistent with the standards and procedures specified" by the MCA, or consistent with federal law and the Constitution, to the extent that they apply. MCA § 3(a) (adding 10 U.S.C. § 950(g)). There is no provision for review of factual conclusions; rather, "the Court of Appeals may act only with respect to matters of law." *Id.*

5. On remand from this Court, the district court interpreted MCA § 7 to require dismissal of Hamdan's habeas petition. That court first held that the MCA removed statutory habeas jurisdiction from the federal courts. While noting that "Congress must articulate specific and unambiguous statutory directives to effect a repeal" of habeas jurisdiction, *INS v. St. Cyr*, 533 U.S. 289, 299 (2001), the court nevertheless rejected Petitioner's argument that § 7(b) of the MCA does not clearly apply retroactively to pending habeas petitions. App. 4a-6a.

The district court next held that the MCA did not suspend the constitutional right to habeas because the conditions for suspension did not exist. *Id.* 11a-12a. Nevertheless, it held that the general availability of constitutional (as opposed to statutory) habeas was of no help to Hamdan because, as an alien enemy, he was not entitled to seek the writ. Despite this Court's statement in *Rasul v. Bush*, 542 U.S. 466, 481 (2004), that its interpretation of the habeas statute was "consistent with the historical reach of the writ of habeas corpus," the district court dismissed as dicta *Rasul*'s discussion of habeas petitions brought by aliens detained in territory under the control of the

Executive in England and the United States. App. 12a-13a.

Rather than following *Rasul*, the district court relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where this Court held that German citizens convicted of war crimes in post-World War II China and imprisoned in Germany had no right to the writ. Having decided that it had been "divested of jurisdiction," the court held it could not consider Hamdan's remaining constitutional challenges. It thus declined to consider the inadequacy of the MCA's review compared to constitutional habeas review, or Hamdan's contentions that the MCA interferes with the judicial function by nullifying this Court's ruling that the Geneva Conventions apply, and that it violates the Bill of Attainder and Equal Protection Clauses. App. 16a.

6. On May 10, 2007, charges of "Conspiracy," and "Providing Material Support for Terrorism" were referred against Hamdan. App. 32a. On June 4, those charges were dismissed without prejudice because Hamdan's CSRT found him to be an "enemy combatant" rather than an "unlawful enemy combatant" as required by the MCA. The government has called that order "technical and semantic;" moved for reconsideration; and announced it would work around the order by "redesignat[ing]" Hamdan for new charges if the appeal failed. W. Glaberson, *Military Judges Dismiss Charges for 2 Defendants*, N.Y. Times, June 5, 2007, at A6.

7. Mr. Hamdan asked this Court to hear his challenge in a Petition for Certiorari Before Judgment and Petition for Certiorari with Omar Khadr. On April 30, the Court denied certiorari, with three Justices dissenting. App. 103a.

8. On June 8, 2007, Mr. Hamdan asked the U.S. Court of Appeals for the D.C. Circuit to hear his case en banc, reasoning that the broad language of the *Boumediene* and *Al Odah* panel decision would control his case and render a panel hearing superfluous. The Government, at the request of the Court of Appeals, filed papers opposing that request. It agreed that the panel decision controlled Hamdan's commission challenge. E.g., U.S. Opp. Pet. Initial En Banc, June 28, 2007, at 3 ("*Boumediene* plainly controls his appeal and forecloses any argument that he is entitled to constitutional habeas rights"). Yet the government opposed en banc review, the only

mechanism by which Hamdan could argue that *Boumediene* was wrongly decided. At present, although the en banc motion is pending, there is no reasonable prospect of additional percolation given this Court's action in *Boumediene*. Both parties agree that in the absence of a hearing en banc, summary judgment in the D.C. Circuit is appropriate.

9. Petitioner Hamdan is one of three individuals who have had charges sworn against them under the MCA. David Hicks of Australia recently pled guilty and will finish serving his sentence at the end of this year in Australia. *See* W. Glaberson, *Plea of Guilty from Detainee in Guantanamo*, N.Y. Times, March 27, 2007, at A1. Omar Khadr of Canada is a Party in the *Boumediene* and *Al Odah* cases. However, the Solicitor General has argued that "[w]hat precludes either Hicks or Kahdr [sic] from specifically raising unique issues about the MCA as it applies to detainees awaiting a military-commission trial is that those issues were neither pressed nor passed on below." U.S. Opp. Cert., No. 06-1169, *Hamdan v. Gates et al.*, at 17 n.2.[2] As such, the *Boumediene* and *Al Odah* cases cannot be expected to vindicate the interests of those detainees actually facing trial and conviction by military commission rather than mere detention.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented Are Exceptionally Important and Require Immediate Determination.

Certiorari before judgment may be granted when a "case is of such imperative public importance as to justify deviation

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[2] According to the Solicitor General, Mr. Khadr did not "file a separate brief from the *Al Odah* detainees, so he has not presented or preserved any of the arguments" that challenge the military commission. U.S. Opp. Mot. Exp., *Hamdan v. Gates et al.*, No. 06-1169, at 7. *See also* U.S. Opp. Cert., No. 06-1169, *Hamdan v. Gates et al.*, at 20 ("[Khadr] made no arguments based on the fact that he was likely to be charged before a military commission, and he concedes (Pet. 6-7) that the arguments he advances here were not raised in *Boumediene* and *Al Odah*. Thus, it comes as no surprise that the court of appeals' opinion treated his case the same as the cases of the other detainees....[J]oining a petition filed on behalf of a detainee who was not a part of his case does not give him any license to make arguments concerning commission detainees that he did not properly raise in *Al Odah*").

from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. *See* U.S. Pet. for Cert. Before J., *United States v. Fanfan*, No. 04-105, *cert. granted*, 125 S. Ct. 12 (2004). This case satisfies that standard.

A. Like *Boumediene* and *Al Odah*, this Petition presents the exceptionally important question of whether the federal courts have any jurisdiction—constitutional or statutory—to consider habeas petitions filed by Guantanamo Bay detainees. The nature and scope of federal habeas jurisdiction over the claims of detainees is a matter of profound national and international importance and is crucial to our carefully attuned separation of powers. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (noting the "necessary role" of the Writ in "maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions").

As explained in detail below, while *Boumediene* and *Al Odah* present these questions as they relate to detainees seeking review of the CSRT process, the instant petition presents them as applied to detainees challenging the jurisdiction of the military commission trials.[3] *See infra* at 9-10. Reviewing the propriety of Congress's attempted removal of habeas jurisdiction from the federal courts requires consideration of *both* of these possible varieties of habeas review that may be sought by detainees. Otherwise the status of individual detainees may be changed to avoid the impact of this Court's anticipated ruling, and this Court's guidance function will be undermined. That is, if this Court were to only review *Boumediene* and *Al Odah* and hold that detainees had a right to review of their detention and CSRT processes, the government could immediately charge those individuals before military commissions and escape the ambit of the Court's ruling. By considering this case along with *Boumediene*, the Court can conclusively determine the nature and scope of constitutional rights, including habeas, enjoyed by all the detainees.

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[3] Indeed, in discussing the inadequacies of the CSRTs as compared to habeas review, the dissent in *Boumediene* drew a distinction between the detainees in that case and individuals (such as Hamdan) who are "facing an imminent trial." App. 91a & n.9 (Rogers, J., dissenting).

B. Access to the federal courts via habeas is determinative of a further essential question: whether the political branches can circumvent the Constitution and decisions of this Court to immunize the proceedings of military tribunals from searching review by Article III courts, despite the summary nature of those proceedings, which were justly regarded with utmost suspicion by our Founders. *Hamdan*, 126 S. Ct. at 2759 ("trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure"); *id.* at 2800 (Kennedy, J., concurring) ("Trial by military commission raises separation-of-powers concerns of the highest order."); *Loving v. United States*, 517 U.S. 748, 760 (1996) ("the Framers harbored a deep distrust of executive military power and military tribunals"). As the War on Terror enters its sixth year, this Court's guidance is needed on whether the judiciary can be summarily removed from its traditional role in safeguarding liberty and the balance of power.

C. Indeed, this Court's grant of certiorari in the closely-related *Al Odah* and *Boumediene* cases shows that there are "compelling reasons" to grant Hamdan's petition as well. S. Ct. R. 10. And the Court has previously granted certiorari before judgment in cases much like this one, involving important questions about the government's use of military commissions and raising separation of powers concerns. *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1 (1942) (certiorari before judgment in a case involving a military commission); *Wilson v. Girard*, 354 U.S. 524 (1957) (certiorari before judgment to determine whether the Constitution applies extraterritorially to restrain military trials); *Kinsella v. Krueger*, 351 U.S. 470 (1956) (same); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (certiorari before judgment in a case impacting foreign policy); *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 17 (1963) (same); *The Three Friends*, 166 U.S. 1 (1897) (same); *United States v. Nixon*, 418 U.S. 683, 686 (1974) (certiorari before judgment in a case raising separation of powers questions); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (same).

Additionally, more than five years since the start of Hamdan's detention and more than three years after his initial filing of a habeas petition, there is nothing to be gained by

further delay. Both Hamdan and the government agree that the *Boumediene* decision is binding on this case – and the Government has opposed en banc review of it. *See supra* p. 5.

D. Finally, this Court has granted certiorari before judgment in cases that, like Hamdan's, were returning to the Court a second time for clarification of the scope or meaning of its prior ruling.[4] In this case, certiorari before judgment is necessary to ensure that any trials that do occur comport with the rule of law and with "judicial guarantees which are recognized as indispensable by civilized peoples." *Hamdan*, 126 S. Ct. at 2795. This Court should resolve—for the benefit of Respondents as well as Petitioner—whether the United States is bound by the Constitution in the criminal trials it is about to initiate, or instead can proceed in defiance of the judgment of our Founders, treaty obligations, rulings of this Court, and international law to maintain "law-free zones" in territories long subject to exclusive U.S. control. To decline to grant certiorari in this case would allow the Government to initiate criminal proceedings under a cloud of uncertainty and potential illegitimacy, to the great detriment of our standing in the world as a country committed to the rule of law.[5]

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[4] *See, e.g., Ins. Group v. Denver & Rio Grande W. R.R.*, 329 U.S. 607 (1947) (prior cases: 329 U.S. 708 (1946) and 328 U.S. 495 (1946)); *Piedmont & N. Ry. v. ICC*, 286 U.S. 299 (1932) (prior case: 280 U.S. 469 (1930)); *Fetters v. United States*, 283 U.S. 812 (1931) (prior case: *Mathues v. United States*, 282 U.S. 802 (1930)); *St. Louis, Kansas City R.R. v. Wabash R.R.*, 217 U.S. 247 (1910) (prior case: *Joy v. St. Louis*, 138 U.S. 1 (1891)).

Last term, this Court and the parties before it dedicated substantial attention to, without finally resolving, many of the same questions presented in this Petition: Petitioner's right to seek the Writ and the validity of an attempt to suspend it. *See Mot. Expedite, Hamdan v. Gates*, at 17.

[5] "Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law." *Hamdan*, 126 S. Ct. at 2772. Consider, for example, the circumstances Petitioner faces. He has been held in U.S. custody for approximately five years, including extended periods in solitary confinement. It is impossible for him to plan for his trial, as he does not even know if due process and other fundamental rights secured by the Constitution will govern his trial and punishment. Such uncertainty, in turn, makes a plea nearly impossible. Ordinary criminal trials apply fixed rules in advance. Here, everything about the trial, including the most basic question of

II. This Case Serves as a Necessary Counterpart to Cases In Which This Court Has Granted Certiorari

Petitioner's case is a necessary and indispensable companion to the *Boumediene* and *Al Odah* cases in which this Court recently granted certiorari. While each case challenges the MCA's purported stripping of jurisdiction and the scope of constitutional protections for a subset of the Guantanamo detainees, each only presents part of the ultimate question to be decided. Consideration of these cases together is necessary for this Court to fully resolve the issues raised by the MCA.

A. First, the petitioners in *Al Odah* and *Boumediene* are challenging the MCA's removal of habeas jurisdiction only as it relates to those detainees challenging the fact of their *detention* and the CSRT process. Those cases have therefore rightly focused on the CSRT procedures and the rights of persons who do not face commissions. *Boumediene*, App. 53a-54a (describing issue presented as whether habeas extends to aliens "detained as enemy combatants"). By contrast, Hamdan challenges the MCA's stripping of habeas jurisdiction over pre-trial jurisdictional challenges to the commission process.[6]

To be sure, the MCA purports to remove habeas jurisdiction over *both* types of claims by operation of section 7(b) of the Act. But the Court's analysis into whether such a removal is permissible will necessarily proceed differently with respect to

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all—does the Constitution apply—is in doubt.

[6] Several decisions distinguish between commissions and CSRTs. *E.g.*, *supra* note 3; *Hamdan*, 126 S. Ct. at 2798. ("Hamdan does not challenge, and we do not today address, the Government's power to detain him"); *id.* at 2817 (Scalia, J., dissenting) ("The vast majority of pending petitions, no doubt, do not relate to military commissions at all, but to more commonly challenged aspects of 'detention' such as the terms and conditions of confinement."); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005), *rev'd by Boumediene, supra*. Because detention raises different concerns than punishment, consideration of Petitioner's case is necessary to review fully the MCA's constitutionality. *E.g.*, *Hamdi*, 542 U.S. at 593 (Thomas, J., dissenting) (drawing a "punishment-nonpunishment distinction"); Amicus Br. of the Military Attorneys Assigned to the Def. in the Office of Military Commissions, *Al Odah*, No. 03-343, at 5-7.

each type of challenge. For example, in assessing the propriety of the removal of jurisdiction, this Court will need to consider whether Congress has provided an adequate alternate remedy to replace habeas corpus. In *Boumediene* and *Al Odah*, this will require a determination as to whether DTA § 1005(e)(2), which provides for review of CSRT determinations after the fact, is such an adequate alternate remedy. *Boumediene*, 476 F.3d at 1006 (Rogers, J., dissenting); *Boumediene* Pet. Cert. at 18; *Al Odah* Cert. Reply at 1-3; *Boumediene* Pet. Reh'g at 3-4. But in Hamdan's case, determination of the *same question* will require inquiry into whether MCA § 3(a), an entirely different provision which governs review of decisions by military commissions, is an adequate substitute for the Great Writ. *See infra* at p. 21-23 (setting forth why § 3(a) is a wholly inadequate remedy). Thus in order to properly assess whether or not Congress has provided an appropriate alternate scheme for review, the Court needs to consider both *Boumediene/Al Odah* and this case.

B. Second, this case raises issues distinct from those raised by *Boumediene* and *Al Odah*. In contrast to the petitioners in those cases, Hamdan faces imminent criminal prosecution in a process that permits the introduction of testimony extracted through coercion, tries him on alleged offenses defined *ex post facto* (one of which a plurality of this Court has already stated does not violate the laws of war), and strips him of the right to invoke treaty-based defenses that this Court has already ruled apply. *Al Odah* and *Boumediene* do not test whether a decision of this Court affording Petitioner treaty-based rights can be side-stepped by a subsequent jurisdictional statute, one which essentially nullifies the law of the case and impermissibly interferes with the judicial function in contravention of *United States v. Klein*, 80 U.S. 128 (1871). Similarly, the *Al Odah* and *Boumediene* petitioners, unlike Hamdan, do not argue that the MCA offends Bill of Attainder and Equal Protection guarantees. These are significant challenges to the jurisdictional provisions of the MCA and a proper review of the Act requires that they be addressed. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003) (certiorari before judgment granted to "address the constitutionality of the consideration of race in university admissions in a wider range of circumstances").

Simultaneous consideration is necessary for the additional reason that the litigating positions of the *Al Odah* and *Boumediene* detainees and Hamdan are at times adverse. The former have argued that those facing military commissions have a weaker claim for habeas review than those who are merely detained. *See, e.g.*, Supp. Br. of Pet'rs Boumediene, et al., and Khalid, *Boumediene v. Bush*, No. 05-5062, at 18 (D.C. Cir.) ("The common law accorded persons who—like Petitioners—had no reasonable prospect of a trial a significantly broader inquiry on habeas than was available to persons awaiting trial on a criminal charge."); Guantanamo Detainees' Supp. Br., *Al Odah v. United States*, No. 05-5064, at 13. By contrast, Hamdan contends that those formally charged and facing prosecution are protected by the Great Writ in full measure. See Br. for Pet. at 8, *Hamdan*, No. 05-184, 126 S. Ct. 2749.

Indeed, the *Boumediene* and *Al Odah* Petitioners go so far as to suggest that those actually facing criminal charges may *not* have access to the Writ. *See Boumediene* Pet. Cert., at 15 n. 12 ("An evolving interpretation of the Suspension Clause is particularly appropriate in cases of indefinite executive detention—like that at issue here—as opposed to detention pursuant to the judgment of a duly constituted criminal court or military tribunal."); *id.* at 23; *id.* at 28; *Al Odah* Cert. Pet. at 13; *Boumediene* Reply Opp. Reh'g 1. Of course, this theory conflicts with this Court's recent decision in *Hamdan* and is certainly not shared by the Petitioner in this case.

The *Boumediene* and *Al Odah* Petitioners claim that the *Eisentrager* decision cannot govern their cases because they do not face military commission charges. This theory, if adopted by the Court, would leave the approximately 75 individuals like Mr. Hamdan who are currently anticipated to be charged (as well as the quite possibly larger number that would be immediately charged if this Court were to adopt that theory) without access to the Great Writ – despite this Court's holdings in *Hamdan*, *Quirin*, *Yamashita*, and *Milligan*. Access to the Great Writ for those facing commissions is not only compelled by longstanding precedent, it carries a less drastic remedy than it does in *Boumediene* and *Al Odah*, where a detainee might conceivably be freed altogether by a federal court order.

There is no reasonable way to untangle this set of issues about *Eisentrager*'s meaning without confronting the adverse readings of that case given by the *Boumediene* and *Al Odah* Petitioners and that offered by Mr. Hamdan. *See, e.g., Boumediene* Pet. Cert., at 17 ("The court of appeals also erred by relying on *Eisentrager*. As this Court explained in *Rasul*, Guantanamo prisoners are 'differently situated from the *Eisentrager* detainees' for several reasons. Justice Kennedy further agreed that the situation of Guantanamo prisoners is 'distinguishable from...*Eisentrager* in two critical ways': because Guantanamo is 'in every practical respect a United States territory,' and because the prisoners were imprisoned indefinitely and lacked 'any legal proceeding to determine their status.'") (citations and footnote omitted); *Al Odah* Cert. Pet. 14 (*Rasul* shows Petitioners to be "fundamentally different from *Eisentrager*" because, *inter alia*, "they have never been charged or convicted of any wrongdoing").

C. Finally, the grant of certiorari before judgment on these grounds would be consistent with this Court's general practice of bringing before it the logical companion to an important case in which certiorari has been granted. For example, in *United States v. Fanfan, rep. sub nom. United States v. Booker*, 543 U.S. 220 (2005), the Court granted certiorari before judgment to hear the case with *Booker*, since both presented the issue of sentencing in federal courts not "based solely upon the guilty verdict." *Id.* at 229. Likewise, the Court granted certiorari before judgment in *Gratz*, 539 U.S. at 259-60, to consider the case alongside *Grutter v. Bollinger*, 539 U.S. 306 (2003), since both involved challenges to affirmative action policies at the University of Michigan. These recent precedents reflect this Court's long history of granting certiorari before judgment to consider similar cases simultaneously.[7]

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[7] *E.g., New Haven Inclusion Cases*, 399 U.S. 392 (1970) (consolidated litigation); *United States v. Thomas*, 362 U.S. 58 (1960) (considered with *United States v. Raines*, 362 U.S. 17 (1960)); *Taylor v. McElroy*, 360 U.S. 709 (1959) (considered with *Greene v. McElroy*, 360 U.S. 474 (1959)); *Kinsella v. Krueger*, 351 U.S. 470 (1956) (considered with *Reid v. Covert*, 351 U.S. 487 (1956)); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (considered with *Brown v. Bd. of Educ.*, 344 U.S. 1 (1952)); *Porter v. Dicken*,

III. The Court Below Erred in Creating a Legal Black Hole at Guantanamo Exempt from the Great Writ.

Even if the MCA validly strips the federal courts of statutory jurisdiction, Petitioner's claims are cognizable under the writ of habeas corpus preserved by the Constitution. The Constitution provides that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I, § 9, cl. 2; *see Smith v. Bennett*, 365 U.S. 708, 712 (1961) (describing the writ as "the highest safeguard of liberty"). This Court has made clear that "habeas corpus is...a writ antecedent to statute,...throwing its roots deep into the genius of our common law.... [and was] an integral part of our common-law heritage by the time the Colonies achieved independence." *Rasul*, 542 U.S. at 473-74. The Founders ensured that the availability of the writ was not dependent upon executive or legislative grace. *St. Cyr*, 533 U.S. at 304 n.24. Thus, the right to habeas exists even in the absence of statutory authorization, and may be suspended only by explicit congressional action under strict conditions.

The conclusion that Hamdan has a constitutional right to habeas follows inexorably from the history of the writ and this Court's precedents, which establish that (1) his claims fall within the scope of the writ as it existed in 1789, (2) his status as alleged enemy combatant presents no bar, and (3) the constitutional right to habeas stretches to Guantanamo Bay.

A. *First*, Petitioner's claims fall squarely within the scope of the habeas inquiry historically available under the common law. This Court has recognized that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).[8] *Rasul* applied the pre-MCA habeas statute to

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328 U.S. 252 (1946) (considered with *Porter v. Lee*, 328 U.S. 246 (1946)); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936) (considered with *United States v. Butler*, 297 U.S. 1 (1936)); *see also* Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259, 297 (1986).

[8] *Boumediene* "truncated" *St. Cyr*'s analysis by eliminating the key words "at the absolute minimum." App. 82a n.5 (Rogers, J., dissenting). Indeed, several cases look to the writ as it has evolved, not as it existed in

Guantanamo detainees because that construction was consistent with the "historical reach of the writ," which was available even "where ordinary writs did not run [in] all...dominions under the sovereign's control." 542 U.S. at 481-82. *Rasul*'s understanding was correct and the courts below erred in ignoring its guidance. *Boumediene*, 476 F.3d at 1002 (Rogers, J., dissenting) (noting that the majority opinion ignored this Court's carefully reasoned and authoritative statement in *Rasul* to reach the opposite conclusion on the territorial reach of common law habeas).

Indeed, the writ has been the primary vehicle for challenges to executive detention since at least 1340. William F. Duker, *A Constitutional History of Habeas Corpus* 24 (1980). And it is in this context that its protections "have been strongest." *St. Cyr*, 533 U.S. at 301; *see also Swain*, 430 U.S. at 386 (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention."); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 475 (1963) ("[t]he classical function of the writ of habeas corpus was to assure the liberty of subjects against detention by the executive or the military....").[9]

Second, the writ historically has been specifically available to test the detention of alleged enemy aliens and prisoners of war. This principle is perfectly illustrated by *King v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759). In *Schiever*, an English court reviewed the sworn statements supporting the habeas petition of a seaman from a neutral nation (Sweden) deemed a prisoner of war after he was captured aboard a French privateer during the Seven Years' War. *Id.* at 552. This Court in *Rasul* correctly read

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1789. *E.g.*, *Felker*, 518 U.S. at 663-64 (1996).

[9] *Boumediene's* discussion of English history, App. 63a-65a, rested on treatises that describe efforts by the Earl of Clarendon to evade the writ by sending prisoners overseas. In passages omitted in *Boumediene*, the treatises go on to explain that Parliament put an end to that practice in 1679. 2 Henry Hallam, *The Constitutional History of England* 230-32 (1989) (1827); Duker, *supra*, at 52-58; Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 52 Int'l & Comp. L.Q. 1, 8 (2004) ("In 1679 this loophole was blocked by section 11 of the Habeas Corpus Amendment Act 1679. For more than three centuries such stratagems to evade habeas corpus have been unlawful in England."). The Framers did not incorporate Clarendon's habeas into the Suspension Clause, but rather the more robust writ that emerged by 1679.

Schiever as proof that suspected enemy aliens can invoke habeas under common law principles.

Early American courts similarly recognized that habeas rights extend to suspected enemy aliens. *See, e.g.*, *Lockington's Case*, Bright. (N.P.) 269 (Pa. 1813) (considering petition of a British citizen imprisoned during the War of 1812); *Laverty v. Duplessis*, 3 Mart. (o.s.) 42, 1813 WL 757 at *1 (La. 1813) (summarizing the district court's decision to release the petitioner on habeas as an incorrectly classified enemy alien).

Third, Guantanamo falls within the geographic scope of the common law writ, which historically had an "extraordinary territorial ambit."[10] Habeas jurisdiction has always turned on de facto control, not formalistic notions of sovereignty.[11]

B. The court below incorrectly denied the right of constitutional habeas to Petitioner based on a misreading of *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950), and an erroneous belief that detention outside the "sovereign realm" of

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[10] *Rasul*, 542 U.S. at 482 n.12 (quoting R. Sharpe, *Law of Habeas Corpus* 188-89 (2d ed. 1989)). In the eighteenth century, habeas was recognized to extend beyond the Kingdom of England; it was "a writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it. It runs, at the common law, to all dominions held of the Crown. It is accommodated to all persons and places." *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 36 (H.L. 1758). Lord Mansfield stated there was "no doubt" the writ could issue in any territory "under the subjection of the Crown," even if that territory was "no part of the realm." *King v. Cowle*, 97 Eng. Rep. 587, 598 (K.B. 1759). The writ extended to India well before Britain's 1813 assertion of sovereignty. By 1775, judges began to issue common-law habeas writs to British subjects *and* "natives." *E.g.*, N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* 81 (2003); B.N. Pandey, *The Introduction of English Law into India* 151 (1967). But until the Act of 1813, 53 Geo. 3, c. 155, the Moghul Emperor retained "formal sovereignty," 4 *The Cambridge History of the British Empire* 592, 595 (1929). *See Boumediene*, App. 83a (Rogers, J., dissenting).

[11] For instances in which the writ issued from a court in England to locations outside the realm but under the control of the Crown, *see King v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (writ issued to Channel Island for individual with "suspicion of treason"); *King v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (Jersey); Sir Matthew Hale, *The History of the Common Law of England* 120 (1739) (Channel Islands). *See also Bourn's Case*, 79 Eng. Rep. 465, 466 (K.B. 1619) (Calais); M. Bacon, *A New Abridgement of the Law*, Tit. Habeas Corpus (B) (7th ed. 1832) (same).

the United States compelled dismissal. App. 15a-16a. In fact, as this Court held earlier with respect to the Geneva Conventions, *Eisentrager* "does not control this case." *Hamdan*, 126 S. Ct. at 2794. Rather, it is distinguishable on multiple grounds, including that: (1) Petitioner is not a national of a country at war with the United States; (2) he disputes his status as an alleged enemy combatant; and (3) the United States exercises exclusive jurisdiction and control at Guantanamo. *Rasul*, 542 U.S. at 476 (identifying these factors to distinguish *Eisentrager*).[12] Thus "nothing in *Eisentrager*...categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts." *Id.* at 484.[13]

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[12] *Eisentrager* does not stand for the proposition that courts are closed to those in Petitioner's position. Rather, the petitioners in *Eisentrager* were provided a full hearing, with the Court carefully considering the substance of petitioners' claims before rejecting them *on the merits*. This Court recognized as much last term in *Hamdan*, noting that in *Eisentrager* "[w]e rejected [petitioners' Geneva Convention] claim on the merits because the petitioners (unlike Hamdan here) had failed to identify any prejudicial disparity 'between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank.'" 126 S. Ct. at 2793. While *Eisentrager* did discuss at length whether enemy aliens were afforded access to American courts, it stated that "the doors of our courts have not been summarily closed upon these prisoners" and that it heard and considered "all contentions they have seen fit to advance" before concluding that no basis for issuing the writ appeared. 339 U.S. at 780-81. Indeed, *Eisentrager* engaged in precisely the same habeas inquiry into the jurisdiction of the military commission that the Court had previously provided in *Quirin*, *Yamashita*, and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). That inquiry focused on "the lawful power of the commission to try the petitioner for the offense charged." 339 U.S. at 787 (quoting *In re Yamashita*, 327 U.S. 1, 8 (1946)).

[13] The *Hamdan* district court relied on the fact that in *Eisentrager* it was immaterial whether the petitioners were in the service of a German civilian or military institution. But that was because the petitioners were *indisputably German nationals*, 339 U.S. at 765, and that status alone rendered them enemies of the U.S. as a matter of law, *id.* at 773-75 & n.6. In addition, *Eisentrager* emphasized that rather than simply being citizens of a nation at war with the U.S., "these prisoners were actual enemies, active in the hostile service of an enemy power. There is no fiction about their enmity." *Id.* at 778. By contrast, Petitioner is a citizen of Yemen, a nation not at war with the U.S., and he does not share the presumptive enemy affiliation of the *Eisentrager* petitioners. *Boumediene*, App. 95a ("These detainees are citizens of friendly nations...[including] Yemen[.]") (Rogers, J., dissenting).

This Court's understanding in *Rasul* and *Hamdan* was correct: *Eisentrager* presented a unique factual situation, and its holding does not govern here. The *Eisentrager* petitioners were German nationals convicted by a military commission in China. The commission was established with the consent of the Chinese Government.[14] Following their convictions, they were detained at Landsberg Prison in occupied Germany, where the United States shared jurisdiction over detentions with the other Allies.[15] Based on this relatively dense legal landscape, the Government claimed in *Eisentrager* that "[t]he rights of these enemy aliens all flow from and must be vindicated within the framework of the system established for the occupation of their country.... They are foreigners in a foreign land, held in that foreign land by the sovereignty now governing it as a result of war, defeat, surrender, and occupation.... [Their] legal status does not differ from that of Germans now detained in Germany by German authorities. Like such prisoners, or like Englishmen in England, or Frenchmen in France, they must look to the rights and remedies open to them under their country's present laws and government," not the American Constitution. U.S. Br., *Eisentrager* 1950 WL 78514, at *65-67 (1950) (No. 306).

In contrast, Guantanamo is "territory over which the United States exercises plenary and exclusive jurisdiction." *Rasul*, 542 U.S. at 475. It is "in every practical respect a United States territory." *Id.* at 487 (Kennedy, J., concurring). There is neither shared control by multiple sovereigns, nor an underlying legal framework apart from the Constitution. Guantanamo in 2007 is not remotely analogous to occupied Germany in 1947, and the arguments counseling denial of the writ in *Eisentrager*—unwillingness to interfere with the multiple sovereigns and the textured, distinctive legal system present in occupied Germany—are absent in the unique case of Guantanamo.

Finally, *Eisentrager* predicated the denial of habeas relief

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[14] *Eisentrager*, Index to Pleadings, Ex.4—Message of 6 July 1946 to Gen. Wedemeyer from Joint Chiefs of Staff. J.A. 167.

[15] *See Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, in Docs. on Germany*, 1944-1970, Comm. For. Re[illegible]nd Cong. (1971), at 150-51.

on three facts that are missing here: (1) the petitioners there had never been within the habeas jurisdiction of the United States, (2) the Court's previous determination that the World War II military commissions were "lawful tribunal[s]," and (3) the Court's judgment on the merits that the *Eisentrager* petitioners had been charged with a recognized war crime. *Id.* at 786-87.

First, not only is Petitioner within the territorial jurisdiction of the United States, for years the Government held him within what this Court deemed the statutory jurisdiction of the federal *courts*. *Compare Eisentrager*, 339 U.S. at 768 (emphasizing that the "alien enemy ...in no stage of his captivity[] has been within its territorial jurisdiction"), *with Rasul*, 542 U.S. at 475-84 (holding that habeas jurisdiction extends to Guantanamo). The Administration has continued to hold Petitioner at Guantanamo for years after *Rasul*. Textually, there was nothing to "suspen[d]" in *Eisentrager*, as the Court found that the writ had never protected the petitioners. Here, by contrast, this Court has found that the writ protects the very subject of this Petition.

Second, *Eisentrager* was decided after *Quirin* and *Yamashita*, where this Court had already upheld the legitimacy of the World War II military commissions. 393 U.S. at 786 ("[W]e have held in the *Quirin* and *Yamashita* cases...that the Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war."). The petitioners in *Eisentrager* thus had no claim that the commission itself was illegitimate. Here, the prior military commission established to try Hamdan (which is identical in most material respects to the commission he faces now) was deemed *unlawful* by this Court only a year ago. *Rasul* observed that the *Eisentrager* petitioners had "been afforded access to [a] tribunal," a factor that weighed against the extension of habeas in that case. *Rasul*, 542 U.S. at 476. It is inconceivable to think that subjection to an unprecedented and unlawful tribunal could satisfy this criterion.

Third, *Eisentrager* recognized that—as in *Quirin* and *Yamashita*—it had jurisdiction to consider whether the petitioners had been charged with an offense cognizable as a war crime. 339 U.S. at 787 (concluding that the charges had "a basis in conventional and long-established law"). That is not the case here; in fact, a plurality of this Court determined that the

previous "conspiracy" charge was *not* a violation of the laws of war. *Hamdan*, 126 S. Ct. at 2785-86. Reliance on *Eisentrager* to deny habeas review is misplaced when no court has had the opportunity to pass on that fundamental jurisdictional question.

C. The district court separately invoked *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), for the proposition that Hamdan cannot assert constitutional rights because he is a non-national with an insubstantial connection with the United States. App. 15a. But the question in this case—whether federal courts retain jurisdiction over constitutional habeas corpus—is entirely independent from the question in *Verdugo-Urquidez*, which involved the application of Fourth Amendment rights abroad. Like other structural protections, the Suspension Clause is not limited to a particular class of individuals, but rather constrains the power of Congress to act. *Cf. Downes v. Bidwell*, 182 U.S. 244, 277 (1901) (emphasizing that it is unnecessary to determine whether the Constitution applies extraterritorially because the Attainder Clause "go[es] to the very root of the power of Congress to act at all"); *see also Boumediene*, App. 77a (both the Suspension Clause and Attainder Clause are "limitations on Congress's powers") (Rogers, J., dissenting).

Hamdan relied on precisely such a conclusion when it held that the President's establishment of a military commission violated the UCMJ and the Geneva Conventions. Implicit in that ruling was the principle that a Guantanamo detainee *can* invoke constitutional restraints—in that case, separation of powers—to contest government action. In other words, if the Constitution did not "protect" Guantanamo detainees, then there would have been nothing barring the President from defying the UCMJ and the Geneva Conventions in trying Hamdan. Indeed, in briefing to this Court the Government argued that *Eisentrager* barred Hamdan's merits claims precisely because the Constitution's structural protections did not extend to Hamdan.[16] Yet the Court rejected the government's position and explicitly relied on

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[16] Specifically, the Government stated that "Petitioner's argument…is predicated on the proposition that the Constitution places structural limits on the President's authority to convene military commissions… As an alien enemy combatant detained outside the United States, petitioner does not enjoy the protections of our Constitution." U.S. Merits Br., *Hamdan*, at 43.

separation of powers to rule in Hamdan's favor. 126 S. Ct. at 2774 n.23 ("[T]he President ...may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.") (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

Crucially, *Rasul* has already suggested that the "fundamental rights" reasoning of *Verdugo* applies to Guantanamo. 542 U.S. at 484 n.15; *id.* at 487 (Kennedy, J., concurring) ("the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it").[17] Yet the court below gave no consideration to this portion of *Rasul*, and instead left Petitioner, who is under the government's complete control, entirely unprotected by the Constitution.

Finally, the issue of whether the Constitution protects Petitioner is crucial not simply for habeas corpus, but for the more fundamental matter of whether the Constitution constrains military commissions at all. For example, trying Petitioner on charges of "Conspiracy" and "Material Support"—offenses newly minted in the MCA—offends the Ex Post Facto Clause. In fact, a plurality of this Court already held that conspiracy is not a violation of the laws of war and "[b]ecause [that] charge

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[17] Furthermore, *Verdugo-Urquidez* does not purport to hold that the Constitution *never* applies to non-nationals located overseas. Although the Court held in that case that the Fourth Amendment did not apply in those circumstances, it regarded as established that certain "'fundamental' constitutional rights are guaranteed to inhabitants of...territories" under the control of the United States. 494 U.S. at 268. The Court emphasized the limited and highly contextual nature of its decision, which carefully examined the history of the Fourth Amendment. *See id.* The degree to which the Constitution applies extraterritorially is complex and dependent on many factors, including the particular provision, the status of the individual claiming its protection, and the territory in question. *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (explaining that the question is not whether the Constitution applies, as it must, but "what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations"). *Verdugo-Urquidez*, moreover, reserved the question whether a person whose "lawful but involuntary" stay was prolonged "by a prison sentence" might be entitled to constitutional protections. 494 U.S. at 271-72.

does not support the commission's jurisdiction, the commission lacks authority to try Hamdan." 126 S. Ct. at 2785. Going forward with a trial under these conditions will not provide a better record for post-trial review by an Article III court, as every tactical decision Petitioner makes would be controlled by the decision below, which found even the most fundamental protections of the Constitution inapplicable. Granting this Petition will provide a concrete case to examine the broad claims of raw power at Guantanamo advanced by the Government, which they have thus far advanced in the context of the Suspension Clause but which will spill over into other constitutional realms, such as the Ex Post Facto Clause.

If the Constitution truly does not constrain these trials, with the eyes of the world upon them and with the very life of a man at stake, such a pronouncement must come from this Court, and in advance of trial so that the litigants can plan accordingly.

Petitioner believes that all Guantanamo detainees have access to the Writ. Regardless of whether this is so, access to the Writ for those facing novel and untested military commissions lies at the core of traditional habeas jurisprudence – as *Milligan*, *Qurin*, and *Yamashita* underscore. In this area of *criminal* enforcement, the Court's institutional competence is at its height, and the harmful consequences of the writ being granted (if any) are at their nadir.

D. Just as with the *Boumediene* and *Al Odah* challenges to the CSRT procedures, the Government cannot avoid Petitioner's Suspension Clause argument on the theory that the MCA provides an adequate substitute for habeas challenges to the military commission process. *See* Boumediene Pet. at 18-21; *Boumediene*, 476 F.3d at 1006 (Rogers, J., dissenting). At the outset, the timing of review under the MCA renders it an insufficient substitute. At common law, courts used habeas to consider pre-trial claims. *Ex parte Royall*, 117 U.S. 241, 253 (1886). By contrast, the MCA defers review until a "final decision" of a military commission. MCA § 3(a) (adding 10 U.S.C. § 950g). Prohibiting judicial review until after these proceedings prevents detainees from vindicating rights violated by the very fact of being tried by an illegal tribunal in the first place. *Hamdan*, 126 S. Ct. at 2770 n.16 (quoting *Schlesinger v.*

Councilman, 420 U.S. 738, 759 (1975)) ("abstention is not appropriate in cases in which individuals raise 'substantial arguments denying the right of the military to try them at all'").

Furthermore, under the MCA, the Executive can avoid *all* judicial review merely by failing to issue a final decision. This ability to avoid any review whatsoever is inconsistent with a core function of habeas, which "has always been available to review the legality of Executive detention." *St. Cyr*, 533 U.S. at 305. The scope of review under the MCA also falls short of the inquiry authorized by constitutional habeas. *See Jones v. Cunningham*, 371 U.S. 236, 243 (1963) ("[habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). The MCA only permits review of "whether the final decision was consistent with the standards and procedures specified" by the MCA, and with federal law and the Constitution to the extent that they apply. MCA § 3(a).[18] Thus, for example, the MCA does not permit challenges to conditions of detention, a category of claims available under constitutional habeas.[19]

The MCA is also ambiguous as to whether the D.C. Circuit can review challenges to the constitutionality of the MCA as a whole. A broad constitutional challenge to the MCA does not clearly fall within the restrictive language describing the scope of review. But such a challenge is a central part of constitutional

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[18] The D.C. Circuit also has the power to review final decisions of a CSRT. The scope of review is analogous, except that the court is permitted to review whether the decision was "supported by a preponderance of the evidence." MCA § 7(a); DTA § 1005(e).

[19] *See Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) ("When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal."); *In re Bonner*, 151 U.S. 242 (1894) (granting habeas petition alleging detention at the wrong type of prison). This is directly relevant in this case, as the new "Camp 6" facility at Guantanamo subjects detainees to virtual solitary confinement – inhumane conditions that violate Common Article 3. R. Jeffrey Smith & Julie Tate, *Uighurs Detention Conditions Condemned*, Wash. Post, Jan. 30, 2007, at A04. Although such challenges are brought under § 1983, *see, Preiser*, 411 U.S. at 498, "[habeas] review is available for claims of 'disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.'" *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) (citation omitted).

habeas. *See Ludecke v. Watkins*, 335 U.S. 160, 162 (1948).

Moreover, the MCA precludes the federal courts from considering Petitioner's treaty claims, by restricting the scope of review to consistency with federal law and the Constitution. MCA § 3(a), § 950g(c). Under common law habeas, in contrast, courts consider and vindicate treaty-based rights. *See, e.g.*, *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 17-18 (1887). Although Congress is free to abrogate treaties entirely, it must do so with a clear statement; otherwise, courts interpret federal law as being consistent with international law obligations. *Cook v. United States*, 288 U.S. 102, 120 (1933); *see also The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The MCA does not constitute any such clear statement—on the contrary, it purports to uphold the Geneva Conventions, *see* MCA § 6—and Petitioner therefore retains his treaty rights but lacks a forum in which to vindicate them.

Finally, the MCA precludes review of the sufficiency of the evidence after commission proceedings. This procedure departs significantly from the factual inquiry available under common law habeas. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (granting writ after considering the evidence and determining no crime had occurred); *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778); *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (examining an affidavit from alleged alien enemies supporting their claims for release); *Schiever*, 97 Eng. Rep. 551 (same); *see also* Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 457 (1966).

IV. The MCA Is Unconstitutional.

Certiorari is also necessary because this case presents questions concerning the constitutionality of the MCA that are not presented by *Boumediene* and *Al Odah*. Specifically, Hamdan challenges the MCA's jurisdiction-stripping provisions as impermissible interference with the judicial function and in violation of Bill of Attainder and Equal Protection guarantees.

A. First, certiorari before judgment is appropriate to address whether the MCA interferes with the fundamental right of equal access to the courts in contravention of the Equal

Protection guarantee of the Fifth and Fourteenth Amendments.[20] *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (laws withdrawing access to fundamental rights are subject to strict scrutiny); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (discrimination in providing access to courts violates equal protection). In using alienage as the dividing line, the MCA is subject to heightened scrutiny. *Graham v. Richardson*, 403 U.S. 365, 371 (1971) ("[C]lassifications based on alienage...are inherently suspect and subject to close judicial scrutiny."); *In re Griffiths*, 413 U.S. 717, 721-22 (1973); *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977). Congress cannot selectively exclude a suspect class from access to the courts without satisfying strict scrutiny review.[21] The Constitution's guarantee of equal protection serves to ensure that the most vulnerable are in some sense represented by those with an adequate voice in the polity. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.").

Strict scrutiny is separately appropriate because the MCA unequally obstructs access to one of the Constitution's most fundamental rights—the right to habeas corpus. *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (habeas is "shaped to guarantee the most fundamental of all rights"). Far less intrusive measures restricting access to courts have failed strict scrutiny. *E.g., Douglas v. California*, 372 U.S. 353, 358 (1963) (striking

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[20] The Equal Protection Clause of the Fourteenth Amendment applies to all "persons" regardless of citizenship. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."). The Supreme Court has recognized that the Fifth Amendment's Due Process Clause embraces the same "concept of equal justice under law," *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976), and accordingly "require[s] the same type of analysis." *Id.*

[21] Congress was able to pass the MCA so quickly—just three weeks after the Administration proposed the bill—only because it affects a class with no say in the political process, namely aliens. *See United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938) (noting that statutes directed at "discrete and insular minorities" may "curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and...may call for a correspondingly more searching judicial inquiry.").

down law allowing appellate courts to decide whether indigent defendants would receive counsel); *Griffin*, 351 U.S. at 15-16 (invalidating regulation denying access to court transcript).

Although the MCA triggers strict scrutiny both by interfering with a fundamental right and by targeting a suspect class, *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896), the district court refused to grant *any* scrutiny to Hamdan's claims and the circuit court's decision in *Boumediene* did not address equal protection issues at all. The statute's dramatic disparity between aliens and citizens should not go unchecked by this Court. If withdrawal of habeas jurisdiction is necessary to "win the War on Terror," then there is no rational reason that it should not be withdrawn for similarly situated American citizens rather than only the powerless.[22]

B. Second, the MCA violates *United States v. Klein*, 80 U.S. 128 (1871), by stripping jurisdiction to prevent implementation of this Court's ruling that Petitioner can invoke rights secured by the Geneva Conventions. *Klein* struck down a statute that prevented courts from giving effect to a presidential pardon, and removed jurisdiction in cases where a pardon was used to evidence loyalty. It held that Congress's manipulation of jurisdiction, which "allowe[d] one party to the controversy to decide it in its own favor," violated separation of powers by "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146.

Here, the MCA prescribes rules of decision within the meaning of *Klein* by simultaneously voiding this Court's holding in *Hamdan*[23] and stripping federal courts of the power

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[22] Judicial invalidation of the MCA on this ground would leave the Government with tremendous flexibility. *Cf. Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("Invocation of the equal protection clause [compared to the due process clause] . . . does not disable any governmental body...It merely means that the prohibition or regulation must have a broader impact.....[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.").

[23] The MCA provides that "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Convention as a source of rights." MCA § 3(a), § 948b(g). This

to review that nullification. Because this Court has made clear that the detainees at Guantanamo, including Hamdan, have rights under the Geneva Conventions that must be respected, *Hamdan*, 126 S. Ct. at 2796, the jurisdiction-stripping provisions are tantamount to allowing one party to decide a controversy in its own favor by removing jurisdiction from courts that would otherwise give effect to the Court's ruling. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) ("Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.").[24] The MCA's provisions are particularly problematic as applied to Hamdan because they purposefully interfere with the ability of the federal courts (such as the court below on remand) to enforce this Court's previous disposition of Hamdan's own case. *Cf. id.* at 228 (separation of powers is "violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons"). This Court's guidance on *Klein*'s scope would clarify whether jurisdiction-stripping legislation that targets a specific ruling "passe[s] the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. at 147.

C. Third, the jurisdiction-stripping provisions of the MCA also violate the prohibition on bills of attainder, a mechanism for ensuring the separation of powers. Laws are Attainders when they inflict "legislative punishment, of any form or severity, on specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965); *see also Selective Serv. Sys.*

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provision invades the judicial function because this Court has already ruled that the Geneva Convention protects Petitioner. *Hamdan*, 126 S.Ct. at 2796 ("Common Article 3...is applicable here and requires that Hamdan be tried by a regularly constituted court."). *See also Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) ("If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution.") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173, 177 (1803)).

[24] By stripping Petitioner of the Geneva Convention protections guaranteed by this Court's June 2006 decision, the MCA removes all treaty-based defenses and effectively operates as a "means to an end" in the same manner as the unconstitutional statute at issue in *Klein*. 80 U.S. at 145.

v. Minn. Pub. Interest Rsch. Group, 468 U.S. 841, 841 (1984).[25]

The MCA singles out non-citizens who—like Petitioner—the Government has unilaterally and extra-judicially labeled "unlawful enemy combatants," i.e., criminals, and then punishes them by depriving them of full and complete habeas review based solely on that status. MCA § 7. A law meets the "singling out" requirement if it operates against a group based on past actions or status designations that cannot be changed. *Cummings v. Missouri*, 71 U.S. 277, 323 (1866) (striking down a law that punished former confederates as an unlawful Attainder); *Ex parte Garland*, 71 U.S. 333, 376 (1866).

The MCA inflicts punishment by stripping detainees of access to federal courts via habeas. First, this Court has historically recognized that the deprivation of full and complete access to the courts is "punishment." *Pierce v. Carskadon*, 83 U.S. 234, 237-38 (1872) (holding that a West Virginia law limiting the access to the courts afforded to former confederate sympathizers was an unlawful attainder).[26] Second, the jurisdiction-stripping provisions of the MCA impose a burden on detainees that greatly outweighs any non-punitive purpose in depriving them of habeas rights. The Attainder Clause is intended to prevent "punishment without trial by duly constituted courts." *See United States v. Lovett*, 328 U.S. 303, 317-18 (1946) (citing *Kahanamoku*, 327 U.S. 304). And third, the legislative history of the MCA illustrates that stripping the courts of habeas jurisdiction reflected a desire to punish those whom Congress viewed as unworthy of trial in U.S. courts.[27] This Court should clarify the scope of the Attainder Clause by

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[25] The Attainder Clause, which acts as a bulwark against Congress's interference with the prerogatives of the Judiciary, was prompted by "the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge or, worse still, lynch mob." *Nixon v. Admin. of Gen. Serv.*, 433 U.S. 425, 480 (1977).

[26] This Court continues to read *Pierce* for the proposition that denying complete access to courts qualifies as attainder. *E.g. Brown*, 381 U.S. at 448 n.21. And it has long recognized that more than criminal sanctions qualify as attainders. *Cummings*, 71 U.S. at 320 ("deprivation of any rights, civil or political, previously enjoyed may be punishment").

[27] *See, e.g.*, 152 Cong. Rec. S10238-01, at S10239 (daily ed. Sept. 27, 2006) (statement of Sen. Lott).

determining whether the MCA runs afoul of that provision.

The importance of the MCA as the defining piece of legislation governing how America conducts itself in the detention and trial of suspected enemies counsels this Court's timely review of challenges to that Act. Now that the Court has granted certiorari in *Boumediene* and *Al Odah* to bring one such challenge before it, it should take the opportunity to develop a more complete set of facts and arguments – including *both* i) challenges to the very same jurisdiction-stripping provision but raised by a Party facing the more dire military commission process and a different but limited review of that process; and ii) constitutional challenges to the same Act, some of which are more limited than those offered by the *Boumediene* Petitioners.

V. The Federal Courts Retain Statutory Jurisdiction To Consider Hamdan's Petition.

A. The court below erred, along with the D.C. Circuit in *Boumediene*, in concluding that the MCA's jurisdiction-stripping provisions applied to pending cases. Instead, the courts should have applied the "[o]rdinary principles of statutory construction" used earlier by this Court to hold that the DTA did not remove jurisdiction over this pending case. *Hamdan*, 126 S. Ct. at 2764. Those principles include presumptions against habeas repeal, against retroactivity, and against interpretations that trigger constitutional questions, all of which favor the continued exercise of jurisdiction. *Id.* at 2765; *St. Cyr*, 533 U.S. at 298. The only cases in which this Court has found retroactive effect have involved statutory language "'so clear that it could sustain only one interpretation.'" *St. Cyr*, 533 U.S. at 317 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)).

Section 7(a) of the MCA adds new subsection (e) to the federal habeas statute, 28 U.S.C. § 2241. Subsection (e) is divided into two subparts. Subpart (1) divests courts of jurisdiction over *habeas applications* filed by aliens determined to be enemy combatants, or awaiting such determination. Subpart (2) divests courts of jurisdiction, except as preserved in the DTA, over any *other actions "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien*" determined to be an enemy combatant,

or awaiting such determination. (Emphasis added.) Section 7(b) of the MCA provides that § 7(a) takes effect on the date of enactment (which was October 17, 2006) and applies to "all cases, without exception, pending on or after the date of enactment of this Act *which relate to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien* detained by the United States since September 11, 2001." (Emphasis added.)

Significantly, § 7(b) does not expressly refer to *habeas cases* pending on the date of enactment.[28] Instead, the language of § 7(b) tracks, virtually word for word, the language used in (e)(2) to refer to "*other actions*" relating to detention, transfer, treatment, et cetera, of detainees. (Emphasis added.) In determining that similar jurisdictional provisions of the DTA did not apply to this case because it was pending on the date of enactment of the DTA, this Court relied on a "negative inference [that] may be drawn from the exclusion of language from one statutory provision [when that language] is included in other provisions of the same statute." *Hamdan*, 126 S. Ct. 2765. Here, the same negative inference may be drawn from the absence of any express reference to a pending *habeas application* in § 7(b), in contrast to § 7(b)'s use of exactly the same terms as (e)(2) to identify the cases to which it applies. This reading is consistent with congressional intent to separate, and treat differently, two different types of actions: mundane challenges to only an "aspect" of detention or trial versus those

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[28] The absence of any mention of habeas in § 7(b) is made even more conspicuous by the fact that habeas actions are explicitly mentioned in MCA § 3(a), which divests courts of jurisdiction over all actions, including habeas petitions, "relating to the prosecution, trial, or judgment of *a military commission* under this chapter." (Emphasis added.) This section of the MCA does not revoke the Court's jurisdiction over Petitioner's challenge because, as the section's title makes clear, it concerns routine challenges to the commission's "Procedures and Actions." Petitioner is not challenging a discrete procedure or action of the commission—he is challenging the new system in its entirety. Furthermore, even if § 3(a) were implausibly read to bar challenges to the military commission system as a whole, Petitioner's action would still survive, because he includes a separate challenge to his detention as an enemy combatant, which is not affected by § 3(a).

challenging the system as a whole.[29] This interpretation of the MCA is also consistent with its drafting history.[30]

B. Finally, this case asks whether Congress has exceeded its legislative power. As described above, Petitioner contends that the MCA's jurisdiction-stripping provisions interfere with the judicial function, violate the Bill of Attainder Clause, and contravene Equal Protection guarantees. The district court erred in failing to reach these arguments because it determined that the MCA had divested it of jurisdiction. App. 15a-16a & n.16. But jurisdiction-stripping provisions that are themselves unconstitutional cannot shield an Act from judicial review. *United States v. United Mine Workers of America*, 330 U.S. 258, 291-97 (1947). To allow such bootstrapping would undermine the principle that "the federal judiciary is supreme in the exposition of the law of the Constitution." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). This Court should consider whether the MCA is unconstitutional because Congress lacked the authority to enact it. Review of this case is appropriate because Petitioner raises a constitutional challenge to the effort by Congress and the President to nullify a ruling of this Court in the *Hamdan* case, a ruling which protects Petitioner as he attempts to defend himself in his impending trial.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari Before Judgment should be granted.

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[29] This Court found a similar distinction when it considered the DTA, noting that Congress may have had "good reason" to preserve jurisdiction for those cases that "challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed," while "channel[ing] to a particular court and through a particular lens of review" those "more routine challenges to final decisions rendered by those tribunals." 126 S. Ct. at 2769.

[30] Congress declined to enact two versions of MCA § 7 that would have expressly stripped jurisdiction over pending habeas cases. *See* H.R. 6054, 109th Cong. § 5 (2006); S. 3886, 109th Cong. § 105 (2006). Congress instead enacted a bill that did not expressly divest courts of jurisdiction over pending habeas cases *and* lacked an explicit retroactivity provision. Congress's rejection of the very language that would have achieved the result the district court found here weighs heavily against that court's interpretation.

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Date: July 2, 2007

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-1519 (JR)

SALIM AHMED HAMDAN, PLAINTIFF,

v.

DONALD H. RUMSFELD, DEFENDANT.

December 13, 2006

MEMORANDUM

The government seeks dismissal of the petition of Salim Ahmed Hamdan for a writ of habeas corpus for lack of subject matter jurisdiction, relying upon the jurisdiction-stripping provisions of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA) [75]. Petitioner resists, arguing that the MCA did not remove our jurisdiction over pending Guantanamo habeas petitions, and alternatively that, if it did, it was an unconstitutional suspension of the writ of habeas corpus [78].

Background

Salim Ahmed Hamdan, a Yemeni national, was taken into United States military custody in Afghanistan in November 2001. He was transported to the Defense Department's detention facility at Guantanamo Bay in June 2002. In July 2003, the President declared him eligible for trial by military commission. On April 6, 2004, Hamdan petitioned for

mandamus or habeas corpus in the United States District Court for the Western District of Washington. On July 13, 2004, after having been held for about two years and eight months without formal charges, Hamdan was finally charged at Guantanamo Bay with a single count of conspiracy. In August 2004, his habeas petition was transferred to this court.

On November 8, 2004, I granted Hamdan's petition for a writ of habeas corpus after finding that he could not be tried lawfully before a military commission that had not been approved by Congress, *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). That decision was reversed by a panel of the D.C. Circuit on July 15, 2005, 415 F.3d 33, in a decision that was itself reversed a year later by the Supreme Court, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), four justices noting that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary" to lawfully try enemy combatants, *Id.* at 2799, (Breyer, J., concurring).[1] On September 22, 2006, the Court of Appeals remanded the case to me "for further proceedings." The remand order contained no instructions, nor was it clear what proceedings, if any, would be possible — for, by that time, the President had indeed "return[ed] to Congress," and he had asked Congress to strip the federal courts of their jurisdiction to hear any habeas petitions of the Guantanamo detainees.

On September 29, 2006 Congress enacted, and on October 17, 2006, the President signed, the Military Commissions Act. The day after the MCA became law, the government filed, in each of the 181 Guantanamo habeas cases pending in this Court, a Notice of Military Commissions Act of 2006 [75], highlighting the jurisdiction-stripping and retroactivity provisions of the Act. The government focused on section 7 of the Act, which amends the federal habeas statute by removing the jurisdiction of any "court, judge, or justice" over habeas petitions and all other actions filed by aliens who are either detained as enemy combatants or are "awaiting such determination." MCA § 7(a). I construed that notice as a motion

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[1] Four justices also concluded that conspiracy is not an offense that may be tried by a military commission. *Id.* at 2779.

to dismiss for lack of subject matter jurisdiction and called for a response from Hamdan [77].[2]

Analysis

The Military Commissions Act and the briefs of the parties present three questions: (1) As a matter of statutory interpretation and construction, did Congress actually succeed in removing our statutory habeas jurisdiction over the detainee habeas cases? (2) If so, is the Military Commissions Act a constitutionally valid "suspension" of the writ of habeas corpus within the meaning of the Suspension Clause, U.S. Const. art. I § 9 cl. 2? (3) If not, and if a "constitutional" writ of habeas corpus survives the Military Commissions Act, does Hamdan have a right to seek such a writ? The answers to these questions are "yes" to number (1) and "no" to numbers (2) and (3).

1. The MCA reflects clear congressional intent to limit the statutory habeas jurisdiction of the federal courts.

It has been clear since *Ex Parte Yerger*, 75 U.S. 85 (1869) (habeas petition by a prisoner facing trial by military commission), that statutory language will be interpreted as stripping courts of their habeas jurisdiction only when the intent of Congress is abundantly clear. "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). In the instant case, it appears to be conceded that Congress's intent to remove jurisdiction over future habeas petitions filed by a specified class of individuals

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[2] I did not issue similar orders in the 14 other Guantanamo habeas cases on my own docket, in deference to the continuing pendency before the Court of Appeals of two cases in which that court has asked for supplemental briefing on the effect of the Military Commissions Act, *Boumediene, et al. v. Bush*, 450 F. Supp. 2d 25 (D.D.C. 2006) (appeal pending); *Al Odah, et al. v. United States*, 346 F. Supp. 2d 1 (D.D.C. 2004) (appeal pending). Hamdan's successful certiorari petition in the Supreme Court, however, sets his case apart from the others. Unlike the petitioners in those other cases, moreover, Hamdan moved for a briefing schedule on the subject of jurisdiction [73] even before the government filed its notice.

was clear enough. Hamdan's submission, however, is that the MCA lacks the requisite clarity to support its retroactive operation — stripping the courts of their jurisdiction over previously filed habeas cases.

Section 7 of the MCA provides:

> (a) IN GENERAL. — Section 2241 of title 28, United States Code [the habeas statute], is amended by . . . inserting the following new subsection (e):
>
> (e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (b) EFFECTIVE DATE. — The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

Relying on what he calls "[o]rdinary principles of statutory construction," [78 at 10] and quoting *Hamdan*, 126 S. Ct. at 2765-69, Hamdan argues that the retroactivity provision of § 7(b) does not clearly apply to the habeas jurisdiction-stripping provision of § 7(a), because, while the language of § 7(b) tracks much of the language in § 7(a) describing cases *other* than habeas petitions, it does not explicitly refer to habeas petitions. The argument is unsuccessful.

Section 7(b) instructs that "the *amendment* made by subsection (a)" is effective immediately, and that it applies both retroactively and prospectively. New subsections (e)(1) and (e)(2) both amend the habeas statute and therefore together comprise "the amendment made by subsection (a)." Section 7(b), then, means that all of § 7(a), and not just the part encompassed in new subsection (e)(2), applies retroactively.

Application of the retroactivity clause in § 7(b) to new subsection (e)(1) is also compelled by the framework of the statute. The references in section 7 are to one large category of cases: those cases that relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of certain aliens. In § 7(a), Congress divided this broad category into two subcategories — (1) habeas petitions and (2) "any other action[s] against the United States . . . relating to any aspect of the detention . . ." — and removed jurisdiction over both types of cases. "Other," as used in this subsection, logically describes cases other than the habeas petitions referenced in the previous subsection and confirms the inclusion of habeas proceedings within the broader category encompassing "all cases . . . pending on or after the date of enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." Section 7(b) applies "without exception" to the broad category of cases encompassing both subcategories addressed in new subsections (e)(1) and (e)(2); this language is "so clear that it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 329 n.4 (1997). Habeas petitions are thus clearly within the ambit of § 7(b).

2. The MCA is not a constitutionally valid suspension of the writ of habeas corpus.

Congress unquestionably has the power to establish and to define the jurisdiction of the lower federal courts. U.S. Const. art. III, §§ 1, 2. But it does not necessarily follow, from the fact that Congress has repealed its statutory grant of habeas jurisdiction, that Congress has also "suspended" the writ. Some historical background will be helpful in explaining why this is so.

The history of habeas corpus — the "symbol and guardian of individual liberty," *Peyton v. Rowe*, 391 U.S. 54, 59 (1968) — is well established. What we now know as the "Great Writ" originated as the "prerogative writ of the Crown";[3] its purpose at first was to bring people into court rather than out of imprisonment. Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. Sch. J. Hum. Rts. 375, 378 (1998), citing S.A. DeSmith, *The Prerogative Writs*, 11 Cambridge L.J. 40 (1951); William F. Duker, *A Constitutional History of Habeas Corpus* 17 (1980). By the year 1230, the writ's utility for that purpose was a well-known aspect of English common law. Clarke, *supra.*

The transformation of the writ to a guardian of liberty dates to the 14th century, when the Norman Conquest overlaid a centralized court system on top of the existing courts. It was during this period that prisoners began to initiate habeas proceedings to challenge the legality of their detention. *Id.* The first such use was by detained members of the privileged classes who raised habeas claims in superior central courts to challenge their convictions in inferior courts; central courts would grant such writs to assert the primacy of their jurisdiction. *Id.* Thus, oddly enough, the original use of the writ by prisoners challenging convictions or detentions had more to do with jurisdictional disputes between courts than concerns over liberty. *Id.*; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 970-71 (1998).

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[3] Standing alone, the phrase "habeas corpus" refers to the common law writ of habeas corpus ad subjiciendum, or the "Great Writ." *Preiser v. Rodriguez*, 411 U.S. 475, 484-85 and n.2 (1973) citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

As the power of the common law courts expanded in the 15th century, so too did the availability and meaning of habeas corpus. The writ became a favorite tool of both Parliament and the judiciary in battling the monarch's assertion of unbridled power. Clarke, *supra* at 380. By 1670, habeas corpus was "the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it." *Bushell's Case*, Vaughan 135, 136, 124 Eng. Rep. 1006, 1007. The growing significance of the writ is reflected in the Habeas Corpus Act of 1679, described by Blackstone as "a second *magna charta*, a stable bulwark of our liberties." 1 Blackstone 133.

Notwithstanding the cherished status of habeas corpus, its suspension in England was not uncommon. The writ was suspended in 1688 and 1696 because of conspiracies against the king, again during the American revolution, and at other points during the 18th century. Rex A. Collings, Jr., *Habeas Corpus for Convicts — Constitutional Right or Legislative Grace?*, 40 Cal. L. Rev. 335, 339 (1952).

Colonists in America were well aware of the growing significance of the Great Writ, and many asserted a common law right to habeas corpus in the period leading up to the adoption of the Constitution. Massachusetts, New Hampshire, and Georgia adopted constitutional provisions guaranteeing the writ or prohibiting its suspension under most circumstances. Max Rosenn, *The Great Writ — A Reflection of Societal Change*, 44 Ohio St. L.J. 337, 338 n.14 (1983). Several delegates to the Constitutional Convention sought to include a guarantee of habeas corpus in the federal Constitution, Erwin Chemerinsky, *Thinking about Habeas Corpus*, 37 Case W. Res. L. Rev. 748, 752, and the language that emerged from the Constitutional Convention, forbidding the suspension of habeas unless necessary in the face of "rebellion or invasion," U.S. Const. art. I, § 9, cl. 2, was a compromise. Habeas corpus nevertheless enjoys powerful and unique constitutional stature as the only common law writ explicitly referenced in the Constitution. The first session of Congress also evinced appreciation for the writ: in section 14 of the Judiciary Act of 1789, Congress affirmatively gave the power to issue writs of

habeas corpus to the newly created federal courts. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat 73, 81. It is that statute, amended several times over the last 217 years, that the MCA has amended once again: this time to take away jurisdiction.[4]

Article I, section 9, clause 2 of the Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." "Although [the Suspension Clause] does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I." *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting), citing Ex parte Bollman, 8 U.S. at 101; *Ex parte Merryman*, 17 F. Cas. 144, 151-152 (CD Md. 1861) (Taney, C. J., rejecting Lincoln's unauthorized suspension); 3 Story § 1336, at 208-209.[5]

Congress has authorized executive suspension of the writ only four times. *See* Duker, *supra* at 149, 178 n.190. All such suspensions were accompanied by clear statements expressing congressional intent to suspend the writ and limiting the suspension to periods during which the predicate conditions (rebellion or invasion) existed. *Id.* The first such instance was during the Civil War, when the status and availability of habeas corpus were at the center of an epic struggle. In 1861, without congressional authorization, President Lincoln gave the Commanding General of the Army permission to suspend the writ in response to rioting between Philadelphia and Washington as Union troops moved down the coast. A. Lincoln, Letter to Commanding General Winfield Scott, (April 27, 1861), reprinted in *Abraham Lincoln: Speeches and Writings,*

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[4] The MCA may not have been Congress's last word on the statutory habeas rights of detainees such as Hamdan. On December 5, 2006, Senators Specter and Leahy introduced the Habeas Corpus Restoration Act of 2006, S. 4081, 109th Cong. (2006), which would grant statutory habeas rights to those whose rights were repealed by the MCA.

[5] In his dissent in *Hamdi*, Justice Scalia also makes reference to President Jefferson's unsuccessful attempt to suspend the writ in response to the Aaron Burr conspiracy. *Hamdi*, 542 U.S. at 563 (Scalia, J. dissenting), *citing* 16 Annals of Congress 402-425 (1807).

1859-1865, at 237 (D. Fehrenbacher ed. 1989). John Merryman was subsequently arrested for interfering with troop movements and challenged the executive suspension of the writ. Chief Justice Taney, riding circuit, heard the case and ruled in Merryman's favor, holding that only Congress may suspend the writ. *Ex parte Merryman*, 17 F. Cas. at 151-152. Lincoln ignored Taney's order, but Congress eventually authorized executive suspension, mooting the question of whether or not Lincoln's initial suspension was unconstitutional and avoiding a Supreme Court test. Act of Mar. 3, 1863, 12 Stat. 755. Thereafter, Lincoln's suspensions explicitly relied upon the congressional grant of authority. *See, e.g.*, Proclamation No. 7, 13 Stat. 734 (1863).

After the Civil War, Congress next authorized executive suspension of the writ in its Ku Klux Klan Act, which allowed President Grant to suspend the writ while rebellions were raging in several South Carolina counties. Duker, *supra* at 178 n.190. Congress's last two authorizations for executive suspension of the writ were in 1902, when it granted suspension power to the President and the governor during a rebellion in the Philippines,[6] and in 1941, after the attack on Pearl Harbor, when Congress authorized the governor of Hawaii to temporarily suspend the writ in that territory.[7] All four congressionally authorized executive suspensions occurred during times of indisputable, and congressionally declared, rebellion or invasion.

The Supreme Court has never decided whether an Act of Congress alone has effectively "suspended" the writ. In two relatively recent cases involving the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), indeed, the Court has carefully avoided saying exactly what the Suspension Clause protects. In *Felker v. Turpin*, 518 U.S. 651 (1996), the Court, per Rehnquist, C.J., "assume[d], for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today,

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[6] Act of July 1, 1902, ch. 1369, 32 Stat. 691.

[7] *See Duncan v. Kahanamoku*, 327 U.S. 304, 307-308 (1946).

rather than as it existed in 1789," but held that the restrictions placed by the AEDPA upon second and successive statutory habeas petitions by prisoners were "well within the compass of [the writ's] evolutionary process, and . . . do not amount to a 'suspension' of the writ contrary to Article I, § 9." 518 U.S. at 663-64. In *INS v. St. Cyr*, 533 U.S. 299 (2001), the Court rejected the government's argument that the AEDPA and the IIRIRA had effectively stripped the federal courts of jurisdiction to decide questions of law. Acknowledging that the scope of the writ has expanded significantly since the Founding, the Court noted that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'" *id.* at 1788 (quoting *Felker*). And the Court went on to observe:

> The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely. Cf. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L.Rev. 961, 980 (1998) (noting that "reconstructing habeas corpus law . . . [for purposes of a Suspension Clause analysis] would be a difficult enterprise, given fragmentary documentation, state-by-state disuniformity, and uncertainty about how state practices should be transferred to new national institutions").[8]

Id. at n.13. Whether the Suspension Clause protects only the "writ antecedent to statute," *Williams v. Kaiser*, 323 U.S. 471, 484 (1945), or "the writ as it exists today," *Felker*, 518 U.S. at 663, its protection is absolute in the absence of "invasion" or

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[8] In both *Felker* and *St. Cyr*, the Court was quick to point out that neither the AEDPA nor the IIRIRA purported to repeal its own original jurisdiction of habeas cases, which was expressly granted by the Judiciary Act of 1789, *Felker*, 518 U.S. at 660-61, quoted in *St. Cyr*, 533 U.S. at 298-99. The jurisdiction-stripping language of the MCA, of course, does purport to repeal the habeas jurisdiction of Supreme Court justices ("No court, *justice* or judge . . . ." MCA § 7(a)).

"rebellion." Neither rebellion nor invasion was occurring at the time the MCA was enacted. Indeed, Congress itself must not have thought that it was "suspending" the writ with the enactment of the MCA, since it made no findings of the predicate conditions, as it did when it approved Lincoln's suspension in the Civil War and each of the subsequent suspensions in Mississippi, the Philippines, and Hawaii. Thus, the Great Writ has survived the Military Commissions Act. If and to the extent that the MCA operates to make the writ unavailable to a person who is constitutionally entitled to it, it must be unconstitutional.

3. Hamdan is not entitled to the constitutional writ that survives the MCA.

The jurisdiction of federal courts over the habeas petitions of detainees at Guantanamo Bay rested upon the grant of jurisdiction in the habeas statute and upon the United States' exercise of "complete jurisdiction and control" over the Navy base in Cuba. *Rasul*, 542 U.S. 466, 471, 481 (2004). Because the habeas statute drew no distinction between citizens and aliens, moreover, the Court found "little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241." *Id.* at 481. My original assumption of jurisdiction of Hamdan's habeas petition depended entirely upon *Rasul* and upon § 2241, 344 F. Supp. 2d at 156. Now that the MCA has amended § 2241 so that it no longer serves as the basis for my jurisdiction, I must inquire whether Hamdan or any other alien is constitutionally entitled to the writ.

It has long been the practice of judges to ascertain the "meaning of the term habeas corpus [by reference to] the common law." *Ex parte Bollman*, 8 U.S. at 93-94 (1807). Petitioner cites at least two English common law cases in which "aliens detained by the Executive at wartime" brought habeas petitions challenging their designation as enemies. [78 at 20], citing *Case of the Three Spanish Sailors*, 96 Eng. Rep. 775, 776 (C.P. 1779); *Rex v. Schiever*, 97 Eng. Rep. 551 (K. B. 1759). In dicta, the majority in *Rasul* cited several other examples of pre-

1789 habeas petitions brought by aliens detained within the sovereign territory or elsewhere within the sovereign's control. *Rasul*, 542 U.S. at 481 n.11.[9] Unfortunately, those cases do not so easily resolve the issue when the statutory grant of habeas has been withdrawn. In each of them, habeas relief was either (1) denied, in an opinion that failed to distinguish between jurisdictional and substantive grounds for the dismissal;[10] (2) denied to a prisoner of war without connections to the country in which the writ was sought;[11] or (3) granted to an alien with a significant relationship to the country in which the writ was sought.[12] Not one of the cases mentioned in *Rasul* held that an alien captured abroad and detained outside the United States — or in "territory over which the United States exercises exclusive jurisdiction and control," *Rasul*, 542 U.S. at 475 — had a common law or constitutionally protected right to the writ of habeas corpus.[13]

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[9] The court supplied the following list of English and American habeas proceedings prior to 1789 and shortly thereafter: *King v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759); *Sommersett v. Stewart*, 20 How. St. Tr. 1, 79-82 (K. B. 1772); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K. B. 1810)); *United States v. Villato*, 2 Dall. 370, 2 U.S. 370, 1L. Ed. 419 (CC Pa. 1797); *Ex parte D'Olivera*, 7 F. Cas. 853, F. Cas. No. 3967 (CC Mass 1813) (Story, J., on circuit); *Wilson v. Izard*, 30 F. Cas. 131, F. Cas. No. 17810 (CC NY 1815) (Livingston, J., on circuit).

[10] *See, e.g., Case of the Three Spanish Sailors*, 96 Eng. Rep. 775, 776 (C.P. 1779); *Rex v. Shiever*, 97 Eng. Rep. 551 (K. B. 1759). Note, too, that petitioners in both of these cases were held within English sovereign territory, unlike petitioner Hamdan.

[11] *Rex v. Schiever* falls under this category as well: "[petitioner] is the King's prisoner of war, and we have nothing to do in that case, nor can we grant an habeas corpus to remove prisoners of war." 96 Eng. Rep. 1249 (K. B. 1759).

[12] *See, e.g., U.S. v. Villato*, 2 U.S. 370, 28 F. Cas. 377, 1 L. Ed. 419 (No. 16,622) (Pa. 1797) (petitioner, though Spanish-born, had traveled from New Orleans to Philadelphia and attempted to become a citizen before the offense that precipitated his detention).

[13] Note that even *INS v. St Cyr*, heavily relied upon by petitioner Hamdan and filled with language extolling the importance of habeas corpus in challenging executive detention, contains this limited description of the rights herein asserted: "[i]n England prior to 1789, in

The petitioner in *Sommersett v. Stewart* was not an enemy alien but a slave challenging his enslavement. Unlike Hamdan, James Sommersett was temporarily residing in England, and the asserted unlawfulness of his confinement stemmed from the arguable illegality of slavery in England. 98 Eng. Rep. 499 (K. B. 1772). In the *Case of the Hottentot Venus*, Saartje Baartman — a South African exhibited in a cage in Piccadilly, England — was a non-enemy foreigner from the British Protectorate of South Africa who could invoke the protection of the Crown by right. 104 Eng. Rep. 344 (K. B. 1810).

In American habeas actions, alien petitioners have had access to the writ largely because they resided, lawfully or unlawfully, on American soil. *See, e.g., The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903) (alien, while alleged to have entered the country unlawfully, nevertheless had made himself "a part of its population"); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (petitioner had been a legal resident of the United States for over twenty years). Hamdan has been a prisoner of the United States for five years. He has lived nearly all of that time within the plenary and exclusive jurisdiction of the United States, but he has not become a part of the population enough to separate himself from the common law tradition generally barring non-resident enemy aliens from accessing courts in wartime. *See Ex parte Kawato*, 317 U.S. 69, 72-75 (1942) (describing common law rule). His detention in Guantanamo, in other words, has not meaningfully "increase[d] his identity with our society." *Eisentrager v. Johnson*, 339 U.S. 763, 770 (1950).

It is the *Eisentrager* case that appears to provide the controlling authority on the availability of constitutional habeas to enemy aliens.[14] In that case, petitioners were Germans living in China in the aftermath of World War II. *Id.* at 765. After trial

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the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to *nonenemy aliens* as well as to citizens," 533 U.S. at 301.

[14] *Eisentrager* was unimportant to the statutory habeas question presented the last time Hamdan was here, as the Supreme Court had made plain in *Rasul*, 542 U.S. at 475-76, and was not dispositive on the questions presented in the earlier *Hamdan* case, 126 S. Ct. at 2794.

before a United States Military Commission in China, they were convicted of war crimes and sent to occupied Germany to serve their sentences. *Id.* at 766. The Supreme Court held that they had no constitutional entitlement to habeas relief in U.S. Courts because "at no relevant time were [they] within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 778.

Hamdan contends that several of the differences between the Guantanamo petitioners and the *Eisentrager* petitioners are constitutionally significant. First, he notes that the *Eisentrager* petitioners admitted that they were enemy aliens, whereas petitioner Hamdan has always objected to his classification as an unlawful enemy combatant [78 at 25]. Here, however, as in *Eisentrager* (where petitioners amended their petitions to assert that they had really been civilian employees) Hamdan's "exact affiliation is . . . for our purposes, immaterial." *Eisentrager*, 339 U.S. at 765. Second, Hamdan claims that, unlike the *Eisentrager* petitioners, he has never been afforded access to a proper tribunal. That observation is obviously true, thus far, but Hamdan is to face a military commission newly designed, because of his efforts, by a Congress that finally stepped up to its responsibility, acting according to guidelines laid down by the Supreme Court. It is difficult to see how continued habeas jurisdiction could make further improvements in his tribunal. Third, Hamdan argues that, after several years in a territory within "the complete jurisdiction and control" of the United States, his relationship with the United States is more extensive than those of petitioners in *Eisentrager*. *See Rasul*, 542 U.S. at 480. This third distinction merits further consideration.

Hamdan's lengthy detention beyond American borders but within the jurisdictional authority of the United States is historically unique. Nevertheless, as the government argues in its reply brief, his connection to the United States lacks the geographical and volitional predicates necessary to claim a constitutional right to habeas corpus [85-1 at 15]. Petitioner has never entered the United States and accordingly does not enjoy the "implied protection" that accompanies presence on

American soil. *Eisentrager*, 339 U.S. at 777-79. Guantanamo Bay, although under the control of the United States military, remains under "the ultimate sovereignty of the Republic of Cuba." *Rasul*, U.S. 542 at 471. Presence within the exclusive jurisdiction and control of the United States was enough for the Court to conclude in *Rasul* that the broad scope of the habeas *statute* covered Guantanamo Bay detainees, but the detention facility lies outside the sovereign realm, and only U.S. citizens in such locations may claim entitlement to a *constitutionally* guaranteed writ. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). There is no dispute, moreover, that Hamdan's presence within the exclusive jurisdiction of the United States has been involuntary. Presence within the United States that is "lawful but involuntary [ ] is not of the sort to indicate any substantial connection with our country" that would justify the invocation of a constitutional right to habeas corpus, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).[15]

Conclusion

Congress's removal of jurisdiction from the federal courts was not a suspension of habeas corpus within the meaning of the Suspension Clause (or, to the extent that it was, it was plainly unconstitutional, in the absence of rebellion or invasion), but Hamdan's statutory access to the writ is blocked by the jurisdiction-stripping language of the Military Commissions Act, and he has no constitutional entitlement to habeas corpus.[16]

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[15] My ruling does not address whether and to what extent enemy aliens may invoke other constitutional rights; I find only that the Suspension Clause does not guarantee the right to petition for habeas corpus to non-resident enemy aliens captured and detained outside the United States.

[16] Having been divested of jurisdiction over Hamdan's habeas petition, I do not reach his other arguments that the MCA is unconstitutional — because it does not provide an adequate substitute for habeas review, because it violates the principle of separation of powers by instructing the courts to ignore the Supreme Court's ruling that the Geneva Conventions afford judicially enforceable protections to

Hamdan's habeas petition must accordingly be dismissed for want of subject matter jurisdiction.

JAMES ROBERTSON
United States District Judge

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petitioner Hamdan, because it is an unlawful Bill of Attainder, and because it violates Equal Protection.

APPENDIX B

The Suspension Clause, U.S. Const. art I, § 9, cl. 2, states:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. Const., art. I, § 9, cl. 3, states:

No Bill of Attainder or Ex Post Facto law shall be passed.

U.S. Const., Amend. 5 states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. 14 states in part:

[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

APPENDIX C

1. The Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739, provides in relevant part:

TITLE X—MATTERS RELATING TO DETAINEES

* * *

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

* * *

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS. —

(1) IN GENERAL. — Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider —

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who —

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION. —

(A) IN GENERAL. — Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS. — The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien —

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW. — The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of —

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY. — The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS. —

(A) IN GENERAL. — Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW. — Review under this paragraph —

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS. — The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien —

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW. — The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with

respect to an alien under this paragraph shall be limited to the consideration of —

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT. — The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

* * *

(h) EFFECTIVE DATE. —

(1) IN GENERAL. — This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS. — Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

* * *

2. The Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, provides in relevant part:

* * *

SEC. 3. MILITARY COMMISSIONS.

(a) MILITARY COMMISSIONS. —

(1) IN GENERAL. — Subtitle A of title 10, United States Code, is amended by inserting after chapter 47 the following new chapter:

"CHAPTER 47A—MILITARY COMMISSIONS

* * *

"§ 948a. Definitions

"In this chapter:

"(1) UNLAWFUL ENEMY COMBATANT. —

(A) The term 'unlawful enemy combatant' means —

"(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

"(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

"(B) CO-BELLIGERENT. — In this paragraph, the term 'co-belligerent', with respect to the United States, means any State or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy."

* * *

"§ 948c. Persons subject to military commissions

"Any alien unlawful enemy combatant is subject to trial by military commission under this chapter."

"§ 948d. Jurisdiction of military commissions

"(a) JURISDICTION. — A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

"(b) LAWFUL ENEMY COMBATANTS. — Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.

"(c) DETERMINATION OF UNLAWFUL ENEMY COMBATANT STATUS DISPOSITIVE. — A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter.

"(d) PUNISHMENTS. — A military commission under this chapter may, under such limitations as the Secretary of Defense may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when authorized under this chapter or the law of war."

* * *

"§ 950g. Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court

"(a) EXCLUSIVE APPELLATE JURISDICTION. — (1)(A) Except as provided in subparagraph (B), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority) under this chapter.

"(B) The Court of Appeals may not review the final judgment until all other appeals under this chapter have been waived or exhausted.

"(2) A petition for review must be filed by the accused in the Court of Appeals not later than 20 days after the date on which —

"(A) written notice of the final decision of the Court of Military Commission Review is served on the accused or on defense counsel; or

"(B) the accused submits, in the form prescribed by section 950c of this title, a written notice waiving the right of the accused to review by the Court of Military Commission Review under section 950f of this title.

"(b) STANDARD FOR REVIEW. — In a case reviewed by it under this section, the Court of Appeals may act only with respect to matters of law.

"(c) SCOPE OF REVIEW. — The jurisdiction of the Court of Appeals on an appeal under subsection (a) shall be limited to the consideration of —

"(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and

"(2) to the extent applicable, the Constitution and the laws of the United States.

"(d) SUPREME COURT. — The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28."

* * *

"§ 950j. Finality or proceedings, findings, and sentences

"(a) FINALITY. — The appellate review of records of trial provided by this chapter, and the proceedings, findings, and sentences of military commissions as approved, reviewed, or affirmed as required by this chapter, are final and conclusive. Orders publishing the proceedings of military commissions under this chapter are binding upon all departments, courts, agencies, and officers of the United States, except as otherwise provided by the President.

"(b) PROVISIONS OF CHAPTER SOLE BASIS FOR REVIEW OF MILITARY COMMISSION PROCEDURES AND ACTIONS. — Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter."

* * *

"§ 950p. Statement of substantive offenses

"(a) PURPOSE. — The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

"(b) EFFECT. — Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter."

* * *

"§ 950v. Crimes triable by military commissions:

"(24) TERRORISM. — Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM — "

"(A) OFFENSE. — Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

"(B) MATERIAL SUPPORT OR RESOURCES DEFINED. — In this paragraph, the term 'material support or resources' has the meaning given that term in section 2339A(b) of title 18."

"(28) CONSPIRACY. — Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct."

* * *

SEC. 7. HABEAS CORPUS MATTERS.

(a) IN GENERAL. — Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):

"(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

"(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.".

(b) EFFECTIVE DATE. — The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

* * *

SEC. 9. REVIEW OF JUDGMENTS OF MILITARY COMMISSIONS.

Section 1005(e)(3) of the Detainee Treatment Act of 2005 (title X of Public Law 109-148; 119 Stat. 2740; 10 U.S.C. 801 note) is amended —

(1) in subparagraph (A), by striking "pursuant to Military Commission Order No. 1. dated August 31, 2005 (or any successor military order)" and inserting "by a military commission under chapter 47A of title 10, United States Code";

(2) by striking subparagraph (B) and inserting the following new subparagraph (B):

"(B) GRANT OF REVIEW. — Review under this paragraph shall be as of right.";

(3) in subparagraph (C) —

(A) in clause (i) —

(i) by striking "pursuant to the military order" and inserting "by a military commission"; and

(ii) by striking "at Guantanamo Bay, Cuba"; and

(B) in clause (ii), by striking "pursuant to such military order" and inserting "by the military commission"; and

(4) in subparagraph (D)(i), by striking "specified in the military order" and inserting "specified for a military commission".

* * *

SEC. 10. DETENTION COVERED BY REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.

Section 1005(e)(2)(B)(i) of the Detainee Treatment Act of 2005 (title X of Public Law 109-148; 119 Stat. 2742; 10 U.S.C. 801 note) is amended by striking "the Department of Defense at Guantanamo Bay, Cuba" and inserting "the United States".

* * *

18 U.S.C. § 2339A(b).

(b) Definitions. — As used in this section —

(1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN, Petitioner, v. DONALD H. RUMSFELD, United States Secretary of Defense, *et al.*, Respondents.	CIVIL ACTION NO. 1:04-cv-01519-JR **NOTICE OF APPEAL**

Notice is hereby given that Salim Ahmed Hamdan, Petitioner in the above-named case, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit, from an Order dismissing the case for lack of subject-matter jurisdiction entered in this action on the 13th day of December, 2006.

LIEUTENANT COMMANDER CHARLES SWIFT
By /s/ Lieutenant Commander Charles Swift
Lieutenant Commander Charles Swift
N.C. Bar #21084

PERKINS COIE LLP
By /s/ Joseph M. McMillan
Harry H. Schneider, Jr. (*pro hac vice*)
Joseph M. McMillan (*pro hac vice*)
Charles C. Sipos (*pro hac vice*)

NEAL KATYAL
By /s/ Neal Katyal
Neal Katyal, D.C. Bar #462071
600 New Jersey Avenue, NW

Washington, D.C. 20001
(202) 662-9000

Attorneys for Petitioner Salim Ahmed Hamdan

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2007, copies of the foregoing **Notice of Appeal**, was served by electronic mail upon the following:

Jonathan L. Marcus
Appellate Section, Criminal Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 5636
Washington, D.C. 20530
(202) 514-8976
(202) 307-4613 (facsimile)
Jonathan.L.Marcus@usdoj.gov

Terry Henry
Thomas Swanton
Civil Division
Federal Programs Branch
U.S. Department of Justice
20 Massachusetts Avenue, NW, Room 7144
Washington, DC 20530
(202) 514-4107
(202) 616-8470 (facsimile)
Terry.Henry@usdoj.gov
Thomas.Swanton2@usdoj.gov

Attorneys for Respondents

/s/ Joseph M. McMillan
Joseph M. McMillan

APPENDIX E

NOTIFICATION OF THE SWEARING OF CHARGES

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
OFFICE OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

_____
(day) (month) (year)

MEMORANDUM FOR Detainee Salim Ahmed Hamdan 0149, Guantanamo Bay, Cuba

SUBJECT: Notification of the Swearing of Charges

1. You are hereby notified that criminal charges were sworn against you on the _____ day of _____, 2007, pursuant to the Military Commissions Act of 2006 (MCA) and the Manual for Military Commissions (MMC). A copy of this notice is being provided to you and to your detailed defense counsel.

2. Specifically, you are charged with the following offenses:

PROVIDING MATERIAL SUPPORT FOR TERRORISM

CONSPIRACY

(Read the charges and specifications to the accused. If necessary, an interpreter may read the charges in a language, other than English, that the accused understands.)

AFFIDAVIT OF NOTIFICATION

I hereby certify that a copy of this document was provided to the named detainee this ___ day of _____, 2007.

_____	_____
Signature	Organization
_____	_____
Typed or Printed Name and Grade	Address of Organization

CHARGE SHEET
I. PERSONAL DATA
1. NAME OF ACCUSED: SALIM AHMED HAMDAN (hereafter "Hamdan")
2. ALIASES OF ACCUSED: Salim Ahmad Hamdan, Salem Ahmed Salem Hamdan, Saqr al Jadawy, Saqr al Jaddawi, Khalid bin Abdalla, Khalid wl'd Abdallah
3. ISN NUMBER OF ACCUSED (LAST FOUR): 0149
II. CHARGES AND SPECIFICATIONS
4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C. **SPECIFICATION:** (See Attached Charge Sheet)

III. SWEARING OF CHARGES		
5a. NAME OF ACCUSER *(Last, First, MI)* TUBBS II, MARVIN, W	**5b. GRADE** O-4	**5c. ORGANIZATION OF ACCUSER** OMC-PROSECUTION
5d. SIGNATURE OF ACCUSER s/ Marvin Tubbs		**5e. DATE (YYYYMMDD)** 20070405

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 5th day of April, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

WILLIAM B. BRITT *Typed Name of Officer*	OMC-PROSECUTION *Organization of Officer*
O-5 *Grade*	10 U.S.C. 1044(b) *Official Capacity to Administer Oath* *(See R.M.C. 307(b) must be commissioned officer)*
s/ WILLIAM B. BRITT *Signature*	

IV. NOTICE TO THE ACCUSED

6. On 5th April, 2007 the accused was notified of the charges against him/her (See R.M.C. 308).

LTC WILLIAM B. BRITT *Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges*	OMC-PROSECUTION *Organization of the Person Who Caused Accused to Be Notified of Charges*
s/ WILLIAM B. BRITT *Signature*	

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at 1411 hours, on 6 April 2007, at Arlington, Virginia.

Location

For the Convening Authority: Jennifer D. Young
Typed Name of Officer

CW3
Grade

s/ Jennifer D. Young
Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)
Convening Authority 10USC §948h Appointed on 6 Feb 2007	Arlington, Virginia	20070510

Referred for trial to the (non)capital military commission convening order 07-04 dated 1 May 2007 subject to the following instructions[1]: this case is referred non-capital

By _____ of _____
Command, Order, or Direction

Susan J. Crawford
Typed Name and Grade of Officer

Convening Authority 10USC 948h
Official Capacity of Officer Signing

s/ Susan J. Crawford
Signature

VII. SERVICE OF CHARGES

9. On _____, 2007 I (caused to be) served a copy these charges on the above named accused.

WILLIAM B. BRITT
Typed Name of Trial Counsel

O-5
Grade of Trial Counsel

_____
Signature of Trial Counsel

FOOTNOTES

[1] See R.M.C. 601 concerning instructions. If none, so state.

UNITED STATES OF AMERICA	)	**CHARGES**
	)	Conspiracy
v.	)	
	)	Providing Material Support for Terrorism
SALIM AHMED HAMDAN (hereafter "Hamdan")	)	

CHARGE I: VIOLATION OF 10 U.S.C. §950v(b)(28), CONSPIRACY

Specification 1: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, conspire and agree with Usama bin Laden, ~~Saif al Adel~~, Ayman al Zawahari, Sheikh Sayeed al Masri, Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al Adel and various members and associates, known and unknown, of the al Qaeda organization and join an enterprise of persons known as al Qaeda, and said al Qaeda engaged in hostilities against the United States, including the 1998 attack against the American Embassies in Kenya and Tanzania, the 2000 attack against the USS Cole, the September 11, 2001 attack against the United States and other, separate attacks, continuing to date and the aforementioned members and associates of al Qaeda shared a common criminal purpose that involved the commission or intended commission of one or more substantive offenses subject to trial by military commission, to wit: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; ~~hijacking or hazarding a vessel or aircraft;~~ and terrorism and the said Hamdan knew the unlawful purpose of the agreement and the common criminal

purpose of the enterprise and joined willfully, with the intent to further said unlawful purpose, and in order to accomplish some objective or purpose of the agreement or enterprise, Hamdan knowingly committed at least one of the following overt acts:

a. Hamdan served as bodyguard for Usama Bin Laden;

b. Hamdan served as Usama Bin Laden's personal driver;

c. Hamdan transported and delivered weapons, ammunition or other supplies to al Qaeda members and associates;

d. Hamdan drove or accompanied Usama bin Laden to various al Qaeda-sponsored training camps, press conferences, or lectures.

e. Hamdan, on various occasions, received weapons training in Afghanistan.

Specification 2: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about November 24, 2001, willfully enter into an agreement with one or more known or unknown members of al Qaeda or Taliban to commit the offense of Murder in Violation of the Law of War, a substantive offense subject to trial by military commission, to wit: the murder of United States or Coalition service members serving as pilots, crew or passengers of United States or Coalition military aircraft, knowing the unlawful purpose of said agreement and joining into said agreement willingly with the intent to further said unlawful purpose, knowingly commit an overt act in order to accomplish some objective or purpose of said agreement, to wit, transporting one or more SA-7 surface to air missiles to be ultimately used to unlawfully and intentionally kill said United States or Coalition service members.

CHARGE II: VIOLATION OF 10 U.S.C. §950v(b)(25) – PROVIDING MATERIAL SUPPORT FOR TERRORISM

Specification 1: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: personnel, himself, to be used in preparation for or carrying out an act of terrorism, and that the said Hamdan knew the said material support or resources were to be used for an act of terrorism, by joining the terrorist organization known as al Qaeda and performing at least one of the following:

a. Received training at an al Qaeda training camp;

b. Served as a driver for Usama bin Laden transporting him to various locations in Afghanistan;

c. Served as Usama bin Laden's armed bodyguard at various locations throughout Afghanistan;

d. Transported weapons or weapons systems or other supplies for the purpose of delivering or attempting to deliver said weapons or weapons systems to Taliban or al Qaeda members and associates.

Specification 2: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in context of or associated with an armed conflict and with knowledge that al Qaeda has engaged in or engages in terrorism, did provide material support or resources, to wit: personnel, himself, to al Qaeda, an international terrorist organization engaged in hostilities against the United States, with the intent to provide such material support and resources to al Qaeda, by becoming a member of the organization and performing at least one of the following:

a. Received training at an al Qaeda training camp;

b. Served as a driver for Usama bin Laden transporting him to various locations in Afghanistan;

c. Served as Usama bin Laden's armed bodyguard at various locations throughout Afghanistan;

d. Transported weapons or weapons systems or other supplies for the purpose of delivering or attempting to deliver said weapons or weapons systems to Taliban or al Qaeda members and associates.

Specification 3: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: weapons and weapons systems, to wit; one or more SA-7 surface to air missiles, to be used in preparation for or carrying out an act of terrorism, and the said Hamdan knew these missiles were to be used for an act of terrorism, by joining the terrorist organization known as al Qaeda and knowingly providing one or more SA-7 surface to air missiles to members of al Qaeda, Taliban or others directly associated with said organizations.

Specification 4: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about November 24, 2001, in the context of or associated with an armed conflict and with knowledge that al Qaeda, has engaged in or engages in terrorism, did provide material support or resources, to wit, weapons and weapons systems, to wit; one or more SA-7 surface to air missiles to al Qaeda, an international terrorist organization engaged in hostilities against the United States, with the intent to provide such material support and resources to al Qaeda, by knowingly providing one or more SA-7 surface to air missiles to members of al Qaeda, Taliban or others directly associated with said organizations.

Specification 5: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: service or transportation by serving as a driver for Usama bin Laden by transporting him to various locations in Afghanistan knowing that by providing said service or transportation he was directly facilitating communication and planning used for an act of terrorism.

Specification 6: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict and with knowledge that al Qaeda, an international terrorist organization engaged in hostilities against the United States, had engaged in or engages in terrorism, intentionally provide material support or resources to al Qaeda, to wit: service or transportation to Usama bin Laden by transporting him to various areas in Afghanistan knowing that by providing said service or transportation he was directly facilitating communication and planning used for acts of terrorism.

Specification 7: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: service as an armed body guard for Usama bin Laden, knowing that by providing said service as an armed bodyguard he was protecting the leader of al Qaeda and facilitating communication and planning used for acts of terrorism.

Specification 8: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict and with knowledge that al Qaeda, an international terrorist organization has engaged in

hostilities against the United States, had engaged in or engages in terrorism, intentionally provide material support or resources, to al Qaeda, to wit: service as an armed body guard for Usama bin Laden by knowing that by providing said service as an armed body guard for Usama bin Laden he was protecting the leader of al Qaeda and facilitating communication and planning used for acts of terrorism.

APPENDIX F
LORD GOLDSMITH, ATTORNEY GENERAL OF THE UNITED KINGDOM TO THE HOUSE OF DELEGATES MEETING OF THE AMERICAN BAR ASSOCIATION
FEBRUARY 12, 2007

It is an honor and a pleasure to have been invited to address you today. The American Bar Association is a great organization admired and listened to by lawyers around the world. It is a privilege therefore to address you, the House of Delegates who represent the lawyers of America at the heart of the ABA.

It is also a pleasure because of the close ties between the American Bar Association and the legal profession in my country. Those links go back many years. In the Middle Temple, one of the great Inns of Court, for example, the generosity of the ABA in helping to rebuild the great Hall, badly damage in enemy action is commemorated. At Runnymede the ABA created a memorial to the signing of Magna Carta, the great charter whose principles underlie both our countries' legal and democratic systems. And over the years the ABA has celebrated its annual meetings in London from time to time. Most recently in the year 2000.

The millennium year was a symbolic year to celebrate our close legal traditions in this year. That celebration included the publication by the ABA of a collection of essays by American and British legal scholars and judges entitled *Common Law, Common Values, Common Rights*. I was privileged to be involved in that project which brought together great American judges such as Chief Justice Judith Kay of New York and Supreme Court Justice Anthony Kennedy and equivalent figures from our own judiciary.

Participating in the project brought home to me how very strong are our ties of the common law and of our common

democratic values. It was the common law in which the founding fathers of this country had confidence, brought by the settlers as part of their culture and adapted to suit the social and economic conditions of the New World.

You reflect that common heritage in the ABA's logo: "Defending Liberty and Pursuing Justice."

These are great and proper ideals which we share. They may not always be comfortable to pursue; it may mean defending clients whose conduct causes revulsion or whose causes are unpopular. But part of defending liberty and pursuing justice is to take on those cases too. Which is why so many who understand these principles were shocked — as I was — when it appeared that a senior Pentagon official was condoning criticism of firms prepared to take on the cases of some of those detained in Guantanamo Bay.

There is a long history in this country, as in mine, of lawyers defending those with unpopular causes without it being thought that the lawyers share the same views as their clients.

So John Adams, later to become second President of the USA, rose to this challenge when as a young lawyer he courted strong personal unpopularity and a major reduction in his practice to defend British soldiers involved in the Boston Massacre of 1770.

In the decision of the House of Lords in *Medcalf v. Weatherill* (2003) the House underlined the importance of this constitutional safeguard describing it as "too often taken for granted."

"Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalized or harassed whether by the Executive, the Judiciary or by anyone else."

I know that the Pentagon official involved has since apologized and resigned and his remarks repudiated by the Administration. I don't come to make any personal attack, but I assure you that remarks of that sort are viewed from across the Atlantic as unjust, unacceptable and un-American.

The ABA's logo encapsulates the ideals for which America has been renowned. Indeed America is a country with a proud tradition as a beacon of freedom, liberty and of justice — assisting my country to free Europe from tyrants in two world wars. American laws have been a model to which others have aspired.

And I am pleased to be able to pay tribute to the work that the ABA has done and supported, for example, by its sponsorship of support of the Central and Eastern European Law Initiative, the CEELI program to help bring stable and independent legal systems to countries emerging from communist dictatorship or torn by civil war. This too has been a model of the values the ABA stands for.

My country has worked too in these important areas, supporting countries, their judges and their lawyers to strengthen the rule of law; and to help build capacity to increase access to justice. There is much that has been done. I have been privileged to see some of it and to hear the benefits it has brought -- such as the help in training black lawyers in the new South Africa; or the help in rehabilitating prisoners I saw in the slums of Nairobi; or the teaching of principles of human rights law to the judges of Iraq trying to recreate a legal system in which the public can have confidence after 30 years of Baathism.

But I believe we can do more. Which is why we are creating new networks of legal assistance to bring together not only the work that is done by Government and lawyers in the public sector — but lawyers and judges in the private sector. I was privileged recently to chair the first meetings of coordinating committees to bring this into being; and to harness the expertise and wisdom of lawyers and judges with the development skills and resources of government.

I foresee the possibility of greater international cooperation too. We should look, for example, at ways to complement the work other countries and organizations, such as the ABA are doing in these fields. That could be a profitable

subject for greater discussion and, if there is interest I would be willing to take this forward.

But as well as sharing a great legal tradition, we share problems too.

One of the most profound, in my view, for our legal system has been how to balance the need to protect our national security and the lives of our citizens after the terrors of 9/11 and the outrages which have followed, including the London underground bombings of 7/7 with the need to protect our civil liberties.

I believe, and have long asserted, that governments have an obligation to protect both: our national security but also our fundamental human rights. Our societies are based on these values; on commitment to liberty and to the rule of law; to our democratic way of life; to freedom of expression and thought; freedom from arbitrary arrest and to fair trial. These liberties were hard fought by our ancestors over the years: from Magna Carta at Runnymede; in the Declaration of Independence and on the fields of battle of the Second World War. They are actually freedoms and liberties and values which the terrorists would destroy. This makes it all the more important that we continue to hold them dear and preserve them.

Striking this balance is not easy. For the threats from terrorism are large. We in my country have not found this easy. We have strengthened our criminal law to meet the conditions of modern terrorism; and we have invested significantly in our front law enforcement agencies and security and intelligence services.

I do not believe the threat that we face can be ignored. So it is right to consider whether changes to existing laws are needed. Indeed even the great human rights instruments of the world, such as the Universal Declaration of Human Rights — in Article 29 — and the European Convention of Human Rights — in many individual articles and in Article 15 particularly — recognize that some times rights have to be adjusted or exceptionally derogated from in the interests of the community more widely.

But this does not give an unlimited license it to throw away our values for the sake of expediency. It can only be undertaken in a principled way.

I would single out three principles.

First, we must respect the rule of law.

That means adhering to our domestic and international legal obligations. These cannot simply be ignored or set aside.

Respecting the rule of law means too subjecting executive action to the scrutiny of the democratic institutions but also of the courts. Judicial scrutiny is a key part of the rule of law. It was to us shocking that until the Supreme Court ruled otherwise in the *Rasul v. President Bush* decision it was thought appropriate to assert that the legality of detentions in a U.S. facility under U.S. control could not be the subject of consideration by the U.S. courts.

Second, it is essential to maintain the commitment to fundamental values and freedoms. That means that whilst there are some rights which are subject to adjustment to safeguard the rights of others — the right to privacy, for example, must allow for exceptions to help fight crime or preserve the legitimate rights of others — there are other rights which are non-negotiable.

The third principle is that in those cases where it is permissible to adjust the way that rights are protected to meet a new challenge or even to derogate from them, only those changes which are necessary to meet the new challenge — and not merely desirable — and which are proportionate to the challenge can be allowed.

The prohibition on torture is one such right on which I would say we should not compromise — one reason why Common Article 3 of the Geneva Conventions is such an important part of a civilized world. The right to a fair trial is another.

In this respect my view of the original Military Commissions for those detained at Guantánamo Bay are well known. Charged with my Prime Minister with considering whether they provided appropriate and sufficient guarantees of a

fair trial I considered the rules and regulations in detail over a period of months in the summer and fall of 2003. My clear conclusion was that the Military Commissions did not provide such guarantees. I advised that we should not allow our citizens to stand trial in such circumstances and insisted that they be returned to the U.K. — which ultimately they were.

I am aware of the changes that have now been made, following the Military Commissions Act signed into law late last year. I welcome some of the changes made — such as the removal of the possibility that detainees would be convicted on the basis of evidence heard in secret and that they had not seen or had a chance to contradict; and the amendments made in Senate to exclude evidence obtained by torture — though there remain some definitional questions of importance. But I am aware of criticisms that remain: of a law which treats aliens in a different way from American citizens; that still allows coerced evidence to be used in certain cases; that excludes the application of habeas corpus. And others. Some — perhaps all of these — will be the subject of further court challenges.

But, it would be misleading if I did not tell you my own view. I have previously stated my view that Guantánamo Bay is unacceptable and should close; it is a symbol of injustice that the long tradition of American justice and liberty ought to see removed at the earliest moment. I have not changed my view. The changes made are too little and too late. There remain fundamental problems with this system of detention. And the symbol remains.

In saying this, I am conscious that some will say that this is not for an outsider to say. That this is America's decision. I have increasingly been of the view that this is not so. I should explain why.

The struggle against global extremism and terrorism is one that ultimately we will not win by conventional means alone. We increasingly recognize in the United Kingdom that we will only win in the end if we can win the battle for ideas and values. We need to win this struggle at the level of values as much as force. In a major speech given in Los Angeles at last

summer, Prime Minister Tony Blair said that to win the war of values we must show that "our values are stronger, better and more just, more fair than the alternative" and that "we are even handed, fair and just in our application of those values to the world."

We have to show, against an al Qaeda narrative that all that the West does is designed to oppress Muslims, our values are actually those of justice, tough and fearless but fair, and of equality; of the democratic way of life; of the rule of law and of freedom. The presence of Guantanamo makes it so much more difficult to do this. For all of us.

So too in relation to other areas of our activity. We must show that our values of democracy, tolerance, acceptance of diversity and justice are strong. We in my country must also approach new laws as well as our public statements with the need to win this battle for ideas in mind.

This battle for ideas and values is then, in my view, of the greatest importance for our future. It is part of your function to uphold the values of the law and of our common law. I have great respect for this organization and I commend you in that responsibility and in meeting the commitment your motto makes clear: to defend liberty and pursue justice.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 8, 2005 Decided February 20, 2007

No. 05-5062

Lakhdar Boumediene, Detainee, Camp Delta, et al.,
Appellants

v.

George W. Bush, President of the United States, et al.,
Appellees

Consolidated with
05-5063

Appeals from the United States District Court
for the District of Columbia
(No. 04cv01142)
(No. 04cv01166)

No. 05-5064

Khaled A.F. Al Odah, Next Friend of Fawzi Khalid
Abdullah Fahad Al Odah et al.,
Appellees/Cross-Appellants

v.

United States of America, et al.,
Appellants/Cross-Appellees

Consolidated with
05-5095, 05-5096, 05-5097, 05-5098, 05-5099, 05-5100,
05-5101, 05-5102, 05-5103, 05-5104, 05-5105, 05-5106,
05-5107, 05-5108, 05-5109, 05-5110, 05-5111, 05-5112,
05-5113, 05-5114, 05-5115, 05-5116

Appeals from the United States District Court
for the District of Columbia
(No. 02cv00828)
(No. 02cv00299)
(No. 02cv01130)
(No. 02cv01135)
(No. 02cv01136)
(No. 02cv01137)
(No. 02cv01144)
(No. 02cv01164)
(No. 02cv01194)
(No. 02cv01227)
(No. 02cv01254)

Before: SENTELLE, RANDOLPH and ROGERS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Circuit Judge* ROGERS.

RANDOLPH, *Circuit Judge*: Do federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the

Guantanamo Bay Naval Base in Cuba? The question has been the recurring subject of legislation and litigation. In these consolidated appeals, foreign nationals held at Guantanamo filed petitions for writs of habeas corpus alleging violations of the Constitution, treaties, statutes, regulations, the common law, and the law of nations. Some detainees also raised non-habeas claims under the federal question statute, 28 U.S.C. § 1331, and the Alien Tort Act, *id.* §1350. In the "Al Odah" cases (Nos. 05-5064, 05-5095 through 05-5116), which consist of eleven cases involving fifty-six detainees, Judge Green denied the government's motion to dismiss with respect to the claims arising from alleged violations of the Fifth Amendment's Due Process Clause and the Third Geneva Convention, but dismissed all other claims. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). After Judge Green certified the order for interlocutory appeal under 28 U.S.C. § 1292(b), the government appealed and the detainees cross-appealed. In the "Boumediene" cases (Nos. 05-5062 and 05-5063) - two cases involving seven detainees - Judge Leon granted the government's motion and dismissed the cases in their entirety. *See Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

In the two years since the district court's decisions the law has undergone several changes. As a result, we have had two oral arguments and four rounds of briefing in these cases during that period. The developments that have brought us to this point are as follows.

In *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004), we affirmed the district court's dismissal of various claims - habeas and non-habeas - raised by Guantanamo detainees. With respect to the habeas claims, we held that "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees." 321 F.3d at 1141. The habeas statute then stated that "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28

U.S.C. § 2241(a) (2004). Because Guantanamo Bay was not part of the sovereign territory of the United States, but rather land the United States leases from Cuba, *see Al Odah*, 321 F.3d at 1142-43, we determined it was not within the "respective jurisdictions" of the district court or any other court in the United States. We therefore held that § 2241 did not provide statutory jurisdiction to consider habeas relief for any alien - enemy or not - held at Guantanamo. *Id.* at 1141. Regarding the non-habeas claims, we noted that "'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign,'" *id.* at 1144 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)), and held that the district court properly dismissed those claims.

The Supreme Court reversed in *Rasul v. Bush*, 542 U.S. 466 (2004), holding that the habeas statute extended to aliens at Guantanamo. Although the detainees themselves were beyond the district court's jurisdiction, the Court determined that the district court's jurisdiction over the detainees' custodians was sufficient to provide subject-matter jurisdiction under § 2241. *See Rasul*, 542 U.S. at 483-84. The Court further held that the district court had jurisdiction over the detainees' non-habeas claims because nothing in the federal question statute or the Alien Tort Act categorically excluded aliens outside the United States from bringing such claims. *See Rasul*, 542 U.S. at 484-85. The Court remanded the cases to us, and we remanded them to the district court.

In the meantime Congress responded with the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA), which the President signed into law on December 30, 2005. The DTA added a subsection (e) to the habeas statute. This new provision stated that, "[e]xcept as provided in section 1005 of the [DTA], no court, justice, or judge" may exercise jurisdiction over

> (1) an application for a writ of habeas corpus filed by or

> on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
>
> (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who
>
> > (A) is currently in military custody; or
> >
> > (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit ... to have been properly detained as an enemy combatant.

DTA § 1005(e)(1) (internal quotation marks omitted). The "except as provided" referred to subsections (e)(2) and (e)(3) of section 1005 of the DTA, which provided for exclusive judicial review of Combatant Status Review Tribunal determinations and military commission decisions in the D.C. Circuit. *See* DTA § 1005(e)(2), (e)(3).

The following June, the Supreme Court decided *Hamdan v. Rumsfeld,* 126 S. Ct. 2749 (2006). Among other things, the Court held that the DTA did not strip federal courts of jurisdiction over habeas cases pending at the time of the DTA's enactment. The Court pointed to a provision of the DTA stating that subsections (e)(2) and (e)(3) of section 1005 "shall apply with respect to any claim ... that is pending on or after the date of the enactment of this Act." DTA § 1005(h). In contrast, no provision of the DTA stated whether subsection (e)(1) applied to pending cases. Finding that Congress "chose not to so provide ... after having been presented with the option," the Court concluded "[t]he omission [wa]s an integral part of the statutory scheme." *Hamdan,* 126 S. Ct. at 2769.

In response to *Hamdan,* Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA), which the President signed into law on October 17, 2006. Section 7 of the MCA is entitled "Habeas Corpus Matters." In subsection (a), Congress again amended § 2241(e). The new amendment reads:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) Except as provided in [section 1005(e)(2) and (e)(3) of the DTA], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

MCA § 7(a) (internal quotation marks omitted). Subsection (b) states:

> The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to *all cases, without exception, pending on or after the date of the enactment* of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

MCA § 7(b) (emphasis added).

The first question is whether the MCA applies to the detainees' habeas petitions. If the MCA does apply, the second question is whether the statute is an unconstitutional suspension of the writ of habeas corpus.[1]

I.

As to the application of the MCA to these lawsuits, section 7(b) states that the amendment to the habeas corpus statute, 28 U.S.C. § 2241(e), "shall apply to all cases, without exception, pending on or after the date of the enactment" that relate to certain subjects. The detainees' lawsuits fall within the subject matter covered by the amended § 2241(e); each case relates to an "aspect" of detention and each deals with the detention of an "alien" after September 11, 2001. The MCA brings all such "cases, without exception" within the new law.

Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*.[2]

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[1] Section 7(a) of the MCA eliminates jurisdiction over non-habeas claims by aliens detained as enemy combatants. That alone is sufficient to require dismissal even of pending non-habeas claims. *See Bruner v. United States*, 343 U.S. 112, 116-17 (1952). Section 7(b) reinforces this result.

[2] Without exception, both the proponents and opponents of section 7 understood the provision to eliminate habeas jurisdiction over pending cases. *See, e.g.*, 152 Cong. Rec. S10357 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy) ("The habeas stripping provisions in the bill go far beyond what Congress did in the Detainee Treatment Act .... This new bill strips habeas jurisdiction retroactively, even for pending cases."); *id.* at S10367 (statement of Sen. Graham) ("The only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply ... the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now."); *id.* at S10403 (statement of Sen. Cornyn) ("[O]nce ... section 7 is effective, Congress will finally accomplish what it sought to do through the [DTA] last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit-only review of the [CSRT] hearings."); *id.* at S10404 (statement of Sen. Sessions) ("It certainly was not my intent, when I voted for the DTA, to exempt all of the pending Guantanamo lawsuits from the

Everyone, that is, except the detainees. Their cases, they argue, are not covered. The arguments are creative but not cogent. To accept them would be to defy the will of Congress. Section 7(b) could not be clearer. It states that "the amendment made by subsection (a)" - which repeals habeas jurisdiction - applies to "all cases, without exception" relating to any aspect of detention. It is almost as if the proponents of these words were slamming their fists on the table shouting "When we say 'all,' we mean all - **without exception**!" [3]

The detainees of course do not see it that way. They say Congress should have expressly stated in section 7(b) that habeas cases were included among "all cases, without exception, pending on or after" the MCA became law. Otherwise, the MCA does not represent an "unambiguous statutory directive[ ]" to repeal habeas corpus jurisdiction. *INS v. St. Cyr,* 533 U.S. 289, 299 (2001). This is nonsense. Section 7(b) specifies the effective date of section 7(a). The detainees' argument means that Congress, in amending the habeas statute (28 U.S.C. § 2241), specified an effective date only for non-habeas cases. Of course Congress did nothing of the sort. Habeas cases are simply a subset of cases dealing with detention. *See, e.g., Preiser v. Rodriguez,* 411 U.S. 475, 484

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provisions of that act. * * * Section 7 of the [MCA] fixes this feature of the DTA and ensures that there is no possibility of confusion in the future.... I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation. The MCA's jurisdictional bar applies to that litigation 'without exception.'"); 152 Cong. Rec. H7938 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter) ("The practical effect of [section 7] will be to eliminate the hundreds of detainee lawsuits that are pending in courts throughout the country and to consolidate all detainee treatment cases in the D.C. Circuit."); *id.* at H7942 (Rep. Jackson-Lee) ("The habeas provisions in the legislation are contrary to congressional intent in the [DTA]. In that act, Congress did not intend to strip the courts of jurisdiction over the pending habeas [cases].").

[3] Congress has rarely found it necessary to emphasize the *absence* of exceptions to a clear rule. Indeed, the use of "without exception" to emphasize the word "all" occurs in only one other provision of the U.S.Code. *See* 48 U.S.C. § 526(a).

(1973).[4] Congress did not have to say that "the amendment made by subsection (a)" - which already *expressly* includes habeas cases - shall take effect on the date of enactment and shall apply to "all cases, without exception, *including habeas cases.*" The *St. Cyr* rule of interpretation the detainees invoke demands clarity, not redundancy.

The detainees also ask us to compare the language of section 7(b) to that of section 3 of the MCA. Section 3, entitled "Military Commissions," creates jurisdiction in the D.C. Circuit for review of military commission decisions, *see* 10 U.S.C. § 950g. It then adds 10 U.S.C. § 950j, which deals with the finality of military commission decisions. Section 950j strips federal courts of jurisdiction over any pending or future cases that would involve review of such decisions:

> Except as otherwise provided in this chapter and notwithstanding any other provision of law (*including section 2241 of title 28 or any other habeas corpus provision*), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

10 U.S.C. § 950j(b) (emphasis added). The detainees maintain

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[4] If section 7(b) did not include habeas cases among cases "which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention," it would be inconsistent with section 7(a). Section 7(a) of the MCA first repeals jurisdiction "to hear or consider an application for a writ of habeas corpus" by detainees. 28 U.S.C. § 2241(e)(1). It then repeals jurisdiction over "any *other* action ... relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of a detainee, *id.* § 2241(e)(2) (emphasis added), thus signifying that Congress considered habeas cases as cases relating to detention, as indeed they are.

that § 950j calls into question Congress's intention to apply section 7(b) to pending habeas cases.

The argument goes nowhere. Section 7(b), read in conjunction with section 7(a), is no less explicit than § 950j. Section 7(a) strips jurisdiction over detainee cases, including habeas cases, and section 7(b) makes section 7(a) applicable to pending cases. Section 950j accomplishes the same thing, but in one sentence. A drafting decision to separate section 7 into two subsections - one addressing the scope of the jurisdictional bar, the other addressing how the bar applies to pending cases - makes no legal difference.[5]

II.

This brings us to the constitutional issue: whether the MCA, in depriving the courts of jurisdiction over the detainees' habeas petitions, violates the Suspension Clause of the Constitution, U.S. CONST. art. I, § 9, cl. 2, which states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the

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[5] The detainees suggest that federal courts retain some form of residual common law jurisdiction over habeas petitions. *Ex parte Bollman,* 8 U.S. (4 Cranch) 75, 95 (1807), holds the opposite. *See Ex parte McCardle,* 74 U.S. 506 (1868). "Jurisdiction of the lower federal courts is ... limited to those subjects encompassed within a statutory grant of jurisdiction." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 701 (1982). The observations about common law habeas in *Rasul,* 542 U.S. at 481-82, referred to the practice in England. Even if there were such a thing as common law jurisdiction in the federal courts, § 2241(e)(1) quite clearly eliminates all "jurisdiction to hear or consider an application for a writ of habeas corpus" by a detainee, whatever the source of that jurisdiction.

In order to avoid "serious 'due process,' Suspension Clause, and Article III problems," the detainees also urge us not to read section 7 of the MCA to eliminate habeas jurisdiction over Geneva Convention claims. But that reading is unavoidable. Section 7 is unambiguous, as is section 5(a), which states that "No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding ... as a source of rights in any court of the United States."

public Safety may require it."

The Supreme Court has stated the Suspension Clause protects the writ "as it existed in 1789," when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus. *St. Cyr*, 533 U.S. at 301; *cf.* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170 (1970). The detainees rely mainly on three cases to claim that in 1789 the privilege of the writ extended to aliens outside the sovereign's territory. In *Lockington's Case*, Bright. (N.P.) 269 (Pa.1813), a British resident of Philadelphia had been imprisoned after failing to comply with a federal marshal's order to relocate. The War of 1812 made Lockington an "enemy alien" under the Alien Enemies Act of 1798. Although he lost on the merits of his petition for habeas corpus before the Pennsylvania Supreme Court, two of three Pennsylvania justices held that he was entitled to review of his detention.[6] In *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779), three Spanish seamen had boarded a merchant vessel bound for England with a promise of wages on arrival. After arriving in England, the English captain refused to pay their wages and turned them over to a warship as prisoners of war. The King's Bench denied the sailors' petitions because they were "alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus." *Id.* at 776. The detainees claim that, as in *Lockington's Case*, the King's Bench exercised jurisdiction and reached the merits. The third case - *Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) - involved a citizen of Sweden intent on entering the English merchant trade. While at sea on an English merchant's ship, a French privateer took Schiever along with the rest of the crew as prisoners, transferred the crew to another French ship, and let

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[6] During this period, state courts often employed the writ of habeas corpus to inquire into the legality of federal detention. The Supreme Court later held in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859), and *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871), that state courts had no such power.

the English prisoners go free. An English ship thereafter captured the French ship and its crew, and carried them to Liverpool where Schiever was imprisoned. From Liverpool Schiever petitioned for habeas corpus, claiming he was a citizen of Sweden and only by force entered the service of the French. The court denied him relief because it found ample evidence that he was a prisoner of war. *Id.* at 552.

None of these cases involved an alien outside the territory of the sovereign. Lockington was a resident of Philadelphia. And the three Spanish sailors and Schiever were all held within English sovereign territory.[7] The detainees cite no case and no historical treatise showing that the English common law writ of habeas corpus extended to aliens beyond the Crown's dominions. Our review shows the contrary. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 53 (1980); 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 116-17, 124 (1982 ed.); 3 BLACKSTONE, COMMENTARIES 131 (1768); *see also* 1 Op. Att'y Gen. 47 (1794); *In re Ning Yi-Ching,* 56 T.L.R. 3, 5 (Vacation Ct.1939) (noting prior judge "had listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominions or realm"). Robert Chambers, the successor to Blackstone at Oxford, wrote in his lectures that the writ of habeas corpus extended only to the King's dominions. 2 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT OXFORD 1767-1773 (composed in association with Samuel Johnson), at 7-8 (Thomas M. Curley ed., 1986). Chambers cited *Rex v. Cowle,* 97 Eng. Rep. (2 Burr.) 587 (K.B. 1759), in which Lord Mansfield stated that "[t]o foreign dominions ... this Court has no power to send any writ of any kind. We cannot send a

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[7] The dissent claims that the difference between Schiever and the detainees is "exceedingly narrow," Dissent at 14, because Schiever was brought *involuntarily* to Liverpool. For this proposition, the dissent cites *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). *Verdugo-Urquidez* was a Fourth Amendment case. Obviously, it had nothing to say about habeas corpus in Eighteenth Century England.

habeas corpus to Scotland, or to the electorate; but to Ireland, the Isle of Man, the plantations [American colonies] ... we may." Every territory that Mansfield, Blackstone, and Chambers cited as a jurisdiction to which the writ extended (e.g., Ireland, the Isle of Man, the colonies, the Cinque Ports, and Wales) was a sovereign territory of the Crown.

When agents of the Crown detained prisoners outside the Crown's dominions, it was understood that they were outside the jurisdiction of the writ. *See* HOLDSWORTH, *supra,* at 116-17. Even British citizens imprisoned in "remote islands, garrisons, and other places" were "prevent[ed] from the benefit of the law," 2 HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 127-28 (William S. Hein Co. 1989) (1827), which included access to habeas corpus, *see* DUKER, *supra,* at 51-53; HOLDSWORTH, *supra,* at 116; *see also* Johan Steyn, *Guantanamo Bay: The Legal Black Hole,* 53 INT'L & COMP. L.Q. 1, 8 (2004) ("the writ of habeas corpus would not be available" in "remote islands, garrisons, and other places" (internal quotation marks omitted)). Compliance with a writ from overseas was also completely impractical given the habeas law at the time. In *Cowle,* Lord Mansfield explained that even in the far off territories "annexed to the Crown," the Court would not send the writ, "notwithstanding the power." 97 Eng. Rep. at 600. This is doubtless because of the Habeas Corpus Act of 1679. The great innovation of this statute was in setting time limits for producing the prisoner and imposing fines on the custodian if those limits were not met. *See* CHAMBERS, *supra,* at 11. For a prisoner detained over 100 miles from the court, the detaining officer had twenty days after receiving the writ to produce the body before the court. *See id.* If he did not produce the body, he incurred a fine. One can easily imagine the practical problems this would have entailed if the writ had run outside the sovereign territory of the Crown and reached British soldiers holding foreign prisoners in overseas conflicts, such as the War of 1812. The short of the matter is that given the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without

presence or property within the United States.

Johnson v. Eisentrager, 339 U.S. 763 (1950), ends any doubt about the scope of common law habeas. "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.* at 768; *see also* Note, *Habeas Corpus Protection Against Illegal Extraterritorial Detention,* 51 COLUM. L. REV. 368, 368 (1951). The detainees claim they are in a different position than the prisoners in *Eisentrager,* and that this difference is material for purposes of common law habeas.[8] They point to dicta in *Rasul,* 542 U.S. 481-82, in which the Court discussed English habeas cases and the "historical reach of the writ." *Rasul* refers to several English and American cases involving varying combinations of territories of the Crown and relationships between the petitioner and the country in which the writ was sought. *See id.* But as Judge Robertson found in *Hamdan,* "[n]ot one of the cases mentioned in *Rasul* held that an alien captured abroad and detained outside the United States - or in 'territory over which the United States exercises exclusive jurisdiction and control,' *Rasul,* 542 U.S. at 475 - had a common law or constitutionally protected right to the writ of habeas corpus." *Hamdan v. Rumsfeld,* No. 04-1519, 2006 WL 3625015, at *7 (D.D.C. Dec. 13, 2006). Justice Scalia made the same point in his *Rasul* dissent, *see Rasul,* 542 U.S. at 502-05 & n.5 (Scalia, J., dissenting) (noting the absence of "a single case holding that aliens held outside the territory of the sovereign were within reach of the writ"), and the dissent acknowledges it here, *see* Dissent at 12. We are aware of no case prior to 1789 going the

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[8] The detainees are correct that they are not "enemy aliens." That term refers to citizens of a country with which the United States is at war. *See Al Odah,* 321 F.3d at 1139-40. But under the common law, the dispositive fact was not a petitioner's enemy alien status, but his lack of presence within any sovereign territory.

detainees' way,[9] and we are convinced that the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government.

The detainees encounter another difficulty with their Suspension Clause claim. Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States. As we explained in *Al Odah*, 321 F.3d at 1140-41, the controlling case is *Johnson v. Eisentrager*. There twenty-one German nationals confined in custody of the U.S. Army in Germany filed habeas corpus petitions. Although the German prisoners alleged they were civilian agents of the German government, a military commission convicted them of war crimes arising from military activity against the United States in China after Germany's surrender. They claimed their convictions and imprisonment violated various constitutional provisions and the Geneva Conventions. The Supreme Court rejected the proposition "that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," 339 U.S. at 783. The Court continued: "If the Fifth Amendment confers its rights on all the world ... [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." *Id.* at 784. (Shortly before Germany's surrender,

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[9] The dissent claims the lack of any case on point is a result of the unique combination of circumstances in this case. But extraterritorial detention was not unknown in Eighteenth Century England. *See* HOLDSWORTH, *supra*, at 116-17; DUKER, *supra*, at 51-53. As noted, *supra*, these prisoners were beyond the protection of the law, which included access to habeas corpus. And *Eisentrager* (and the two hundred other alien petitioners the court noted, *see* 339 U.S. at 768 n.1) involved both extraterritorial detention and alien petitioners.

the Nazis began training covert forces called "werewolves" to conduct terrorist activities during the Allied occupation. *See* http://www.archives.gov/iwg/ declassified_records/oss_records_263_wilhelm_hoettl.html.)

Later Supreme Court decisions have followed *Eisentrager.* In 1990, for instance, the Court stated that *Eisentrager* "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez,* 494 U.S. 259, 269 (1990). After describing the facts of *Eisentrager* and quoting from the opinion, the Court concluded that with respect to aliens, "our rejection of extraterritorial application of the Fifth Amendment was emphatic." *Id.* By analogy, the Court held that the Fourth Amendment did not protect nonresident aliens against unreasonable searches or seizures conducted outside the sovereign territory of the United States. *Id* . at 274-75. Citing *Eisentrager* again, the Court explained that to extend the Fourth Amendment to aliens abroad "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries," particularly since the government "frequently employs Armed Forces outside this country," *id.* at 273. A decade after *Verdugo-Urquidez,* the Court - again citing *Eisentrager* - found it "well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis,* 533 U.S. 678, 693 (2001).[10]

Any distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of the Suspension Clause. The United States occupies the Guantanamo Bay Naval Base under an indefinite lease it entered into in 1903.

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[10] The Rasul decision, resting as it did on statutory interpretation, *see* 542 U.S. at 475, 483-84, could not possibly have affected the constitutional holding of *Eisentrager.* Even if Rasul somehow calls *Eisentrager*'s constitutional holding into question, as the detainees suppose, we would be bound to follow *Eisentrager. See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484-85 (1989).

See Al Odah, 321 F.3d at 1142. The text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba - not the United States - has sovereignty over Guantanamo Bay. *See Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381 (1948); *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir.1995). The "determination of sovereignty over an area," the Supreme Court has held, "is for the legislative and executive departments." *Vermilya-Brown*, 335 U.S. at 380. Here the political departments have firmly and clearly spoken: "'United States,' when used in a geographic sense ... does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g).

The detainees cite the *Insular Cases* in which "fundamental personal rights" extended to U.S. territories. *See Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922); *Dorr v. United States*, 195 U.S. 138, 148 (1904); *see also Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977). But in each of those cases, Congress had exercised its power under Article IV, Section 3 of the Constitution to regulate "Territory or other Property belonging to the United States," U.S. CONST., art. IV, § 3, cl. 2. These cases do not establish anything regarding the sort of *de facto* sovereignty the detainees say exists at Guantanamo. Here Congress and the President have specifically disclaimed the sort of territorial jurisdiction they asserted in Puerto Rico, the Philippines, and Guam.

Precedent in this circuit also forecloses the detainees' claims to constitutional rights. In *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002), we quoted extensively from *Verdugo-Urquidez* and held that the Court's description of *Eisentrager* was "firm and considered dicta that binds this court." Other decisions of this court are firmer still. Citing *Eisentrager*, we held in *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam), that "non-resident aliens ... plainly cannot appeal to the protection of the Constitution or laws of the United States." The law of this circuit is that a "foreign entity without property or presence in

this country has no constitutional rights, under the due process clause or otherwise." *People's Mojahedin Org. of Iran v. U.S. Dep't of State,* 182 F.3d 17, 22 (D.C. Cir. 1999); *see also 32 County Sovereignty Comm. v. U .S. Dep't of State,* 292 F.3d 797, 799 (D.C. Cir. 2002).[11]

As against this line of authority, the dissent offers the distinction that the Suspension Clause is a limitation on congressional power rather than a constitutional right. But this is no distinction at all. Constitutional rights are rights against the government and, as such, *are* restrictions on governmental power. *See H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 534 (1949) ("Even the Bill of Rights amendments were framed only as a limitation upon the powers of Congress.").[12] Consider the First Amendment. (In contrasting the Suspension Clause with provisions in the Bill of Rights, *see* Dissent at 3, the dissent is careful to ignore the First Amendment.) Like the Suspension Clause, the First Amendment is framed as a limitation on Congress: "Congress shall make no law ...." Yet no one would deny that the First Amendment protects the rights to free speech and religion and assembly.

The dissent's other arguments are also filled with holes. It is enough to point out three of the larger ones.

There is the notion that the Suspension Clause is different from the Fourth, Fifth, and Sixth Amendments because it does not mention individuals and those amendments do (respectively,

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[11] The text of the Suspension Clause also does not lend itself freely to extraterritorial application. The Clause permits suspension of the writ only in cases of "Rebellion or Invasion," neither of which is applicable to foreign military conflicts. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 593-94 (2004) (Thomas, J., dissenting); *see also* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. (forthcoming 2007) (manuscript at 59-60, *available at* http://ssrn.com/abstract=888602).

[12] James Madison's plan was to insert almost the entire Bill of Rights into the Constitution rather than wait for amendment. His proposed location of the Bill of Rights? Article I, Section 9 - next to the Suspension Clause. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 700-01 & n.437 (1999).

"people," "person," and "the accused"). *See* Dissent at 3. Why the dissent thinks this is significant eludes us. Is the point that if a provision does not mention individuals there is no constitutional right? That cannot be right. The First Amendment's guarantees of freedom of speech and free exercise of religion do not mention individuals; nor does the Eighth Amendment's prohibition on cruel and unusual punishment or the Seventh Amendment's guarantee of a civil jury. Of course it is fair to assume that these provisions apply to individuals, just as it is fair to assume that petitions for writs of habeas corpus are filed by individuals.

The dissent also looks to the Bill of Attainder and Ex Post Facto Clauses, both located next to the Suspension Clause in Article I, Section 9. We do not understand what the dissent is trying to make of this juxtaposition. The citation to *United States v. Lovett*, 328 U.S. 303 (1946), is particularly baffling. *Lovett* held only that the Bill of Attainder Clause was justiciable. The dissent's point cannot be that the Bill of Attainder Clause and the Ex Post Facto Clause do not protect individual rights. Numerous courts have held the opposite.[13] "The fact that the Suspension Clause abuts the prohibitions on bills of attainder and ex post facto laws, provisions well-accepted to protect individual liberty, further supports viewing the habeas privilege as *a core individual right*." Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 374 & n.227 (2006) (emphasis added).[14]

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[13] *See South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) ("[C]ourts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups ....") (citing *United States v. Brown*, 381 U.S. 437 (1965); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866)); *see also Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005); *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468-69 (1977); *Shabazz v. Gabry*, 123 F.3d 909, 912 (6th Cir. 1997).

[14] *Accord* Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV.

Why is the dissent so fixated on how to characterize the Suspension Clause? The unstated assumption must be that the reasoning of our decisions and the Supreme Court's in denying constitutional rights to aliens outside the United States would not apply if a constitutional provision could be characterized as protecting something other than a "right." On this theory, for example, aliens outside the United States are entitled to the protection of the Separation of Powers because they have no individual rights under the Separation of Powers. Where the dissent gets this strange idea is a mystery, as is the reasoning behind it.

III.

Federal courts have no jurisdiction in these cases. In supplemental briefing after enactment of the DTA, the government asked us not only to decide the habeas jurisdiction question, but also to review the merits of the detainees' designation as enemy combatants by their Combatant Status Review Tribunals. *See* DTA § 1005(e)(2).[15] The detainees objected to converting their habeas appeals to appeals from their Tribunals. In briefs filed after the DTA became law and after the Supreme Court decided *Hamdan,* they argued that we were without authority to do so.[16] Even if we have authority to

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251, 318, 321 (2000) ("[W]e could easily describe [Article I,] Section 9 as a bill of rights for the people of the United States.").

[15] *See* Supplemental Br. of the Federal Parties Addressing the Detainee Treatment Act of 2005 53-54 ("This Court can and should convert the pending appeals into petitions for review under [DTA section] 1005(e)(2).").

[16] *See* The Guantanamo Detainees' Supplemental Br. Addressing the Effect of the Supreme Ct.'s Op. in *Hamdan v. Rumsfeld,* 126 S. Ct. 2749 (2006), on the Pending Appeals 8-9 ("The detainees in the pending petitions challenge the lawfulness of their detentions - not the subsequent CSRT decisions ...."); Corrected Supplemental Br. of Pet'rs Boumediene, et al., & Khalid Regarding Section 1005 of the Detainee Treatment Act of 2005 56-59 ("Nothing in the [DTA] authorizes the Court to 'convert' Petitioners' notices of appeal of the district court's judgment into original petitions for review of CSRT decisions under section 1005(e)(2) of the Act."); The Guantanamo Detainees' Corrected Second Supplemental Br.

convert the habeas appeals over the petitioners' objections, the record does not have sufficient information to perform the review the DTA allows. Our only recourse is to vacate the district courts' decisions and dismiss the cases for lack of jurisdiction.

So ordered.

Addressing the Effect of the Detainee Treatment Act of 2005 on this Ct.'s Jurisdiction over the Pending Appeals 43-44 ("[T]his court should not convert these petitions into petitions for review under the DTA as the government suggests.").

ROGERS, *Circuit Judge*, dissenting: I can join neither the reasoning of the court nor its conclusion that the federal courts lack power to consider the detainees' petitions. While I agree that Congress intended to withdraw federal jurisdiction through the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), the court's holding that the MCA is consistent with the Suspension Clause of Article I, section 9, of the Constitution does not withstand analysis. By concluding that this court must reject "the detainees' claims to constitutional rights," Op. at 21, the court fundamentally misconstrues the nature of suspension: Far from conferring an individual right that might pertain only to persons substantially connected to the United States, *see United States v. Verdugo-Urquidez,* 494 U.S. 259, 271 (1990), the Suspension Clause is a limitation on the powers of Congress. Consequently, it is only by misreading the historical record and ignoring the Supreme Court's well-considered and binding dictum in *Rasul v. Bush,* 542 U.S. 466, 481-82 (2004), that the writ at common law would have extended to the detainees, that the court can conclude that neither this court nor the district courts have jurisdiction to consider the detainees' habeas claims.

A review of the text and operation of the Suspension Clause shows that, by nature, it operates to constrain the powers of Congress. Prior to the enactment of the MCA, the Supreme Court acknowledged that the detainees held at Guantanamo had a statutory right to habeas corpus. *Rasul,* 542 U.S. at 483-84. The MCA purports to withdraw that right but does so in a manner that offends the constitutional constraint on suspension. The Suspension Clause limits the removal of habeas corpus, at least as the writ was understood at common law, to times of rebellion or invasion unless Congress provides an adequate alternative remedy. The writ would have reached the detainees at common law, and Congress has neither provided an adequate alternative remedy, through the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, tit. X, 119 Stat. 2680, 2739 ("DTA"), nor invoked the exception to the Clause by making the required findings to suspend the writ. The MCA is therefore

void and does not deprive this court or the district courts of jurisdiction.

On the merits of the detainees' appeal in *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) and the cross-appeals in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), I would affirm in part in *Guantanamo Detainee Cases* and reverse in *Khalid* and remand the cases to the district courts.

I.

Where a court has no jurisdiction it is powerless to act. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803). But a statute enacted by Congress purporting to deprive a court of jurisdiction binds that court only when Congress acts pursuant to the powers it derives from the Constitution. The court today concludes that the Suspension Clause is an individual right that cannot be invoked by the detainees. *See* Op. at 22. The text of the Suspension Clause and the structure of the Constitution belie this conclusion. The court further concludes that the detainees would have had no access to the writ of habeas corpus at common law. *See* Op. at 14-17. The historical record and the guidance of the Supreme Court disprove this conclusion.

In this Part, I address the nature of the Suspension Clause, the retroactive effect of Congress's recent enactment on habeas corpus - the MCA - and conclude with an assessment of the effect of the MCA in light of the dictates of the Constitution.

A.

The court holds that Congress may suspend habeas corpus as to the detainees because they have no individual rights under the Constitution. It is unclear where the court finds that the limit on suspension of the writ of habeas corpus is an individual entitlement. The Suspension Clause itself makes no reference to citizens or even persons. Instead, it directs that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may

require it." U.S. CONST. art. I, § 9, cl. 2. This mandate appears in the ninth section of Article I, which enumerates those actions expressly excluded from Congress's powers. Although the Clause does not specifically say so, it is settled that only Congress may do the suspending. *Ex parte Bollman,* 8 U.S. (4 Cranch) 75, 101 (1807); *see Hamdi v. Rumsfeld,* 542 U.S. 507, 562 (2004) (Scalia, J., dissenting); *Ex parte Merryman,* 17 F. Cas. 144, 151-152 (No. 9487) (Taney, Circuit Justice, C.C.D. Md. 1861); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1342 (5th ed. 1891). In this manner, by both its plain text and inclusion in section 9, the Suspension Clause differs from the Fourth Amendment, which establishes a "right of the people," the Fifth Amendment, which limits how a "person shall be held," and the Sixth Amendment, which provides rights to "the accused." These provisions confer rights to the persons listed.[1]

The other provisions of Article I, section 9, indicate how to read the Suspension Clause. The clause immediately following provides that "[n]o Bill of Attainder or ex post facto Law shall be passed."[2] The Supreme Court has construed the Attainder

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[1] The Suspension Clause is also distinct from the First Amendment, which has been interpreted as a guarantor of individual rights. *See, e.g., United States v. Robel,* 389 U.S. 258, 263 (1967); *Gitlow v. New York,* 268 U.S. 652, 666 (1925). The court cannot seriously maintain that the two provisions are alike while acknowledging that the First Amendment confers an individual right enforceable by the courts and simultaneously claiming that the Suspension Clause does not, *see* Op. at 13 n.5 (citing *Bollman,* 8 U.S. (4 Cranch) at 95); *see also In re Barry,* 42 F. 113, 122 (C.C.S.D.N.Y.1844), *error dismissed sub nom. Barry v. Mercein,* 46 U.S. 103 (1847) ("The ninth section of the first article of the constitution, par. 2, declaring that 'the privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it,' does not purport to convey power or jurisdiction to the judiciary. It is in restraint of executive and legislative powers, and no further affects the judiciary than to impose on them the necessity, if the privilege of habeas corpus is suspended by any authority, to decide whether the exigency demanded by the constitution exists to sanction the act.").

[2] Suspensions and bills of attainder have a shared history. In England, suspensions occasionally named specific individuals and

Clause as establishing a "category of Congressional actions which the Constitution barred." *United States v. Lovett,* 328 U.S. 303, 315 (1946). In *Lovett,* the Court dismissed the possibility that an Act of Congress in violation of the Attainder Clause was non-justiciable, remarking:

> Our Constitution did not contemplate such a result. To quote Alexander Hamilton,
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> > * * * a limited constitution * * * [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; *whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.* Without this, all the reservations of particular rights or privileges would amount to nothing.

Id. at 314 (quoting THE FEDERALIST NO. 78) (emphasis added) (alteration and omissions in original). So too, in *Weaver v. Graham,* 450 U.S. 24, 28-29 & n.10 (1981), where the Court noted that the ban on *ex post facto* legislation "restricts governmental power by restraining arbitrary and potentially vindictive legislation" and acknowledged that the clause "confin[es] the legislature to penal decisions with prospective effect." *See also Marbury,* 5 U.S. (1 Cranch) at 179-80; *Foretich v. United States,* 351 F.3d 1198, 1216-26 (D.C. Cir. 2003). For like reasons, any act in violation of the Suspension Clause is void, *cf. Lovett,* 328 U.S. at 316, and cannot operate to

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therefore amounted to bills of attainder. *See* Rex A. Collings, Jr., *Habeas Corpus for Convicts - Constitutional Right or Legislative Grace?,* 40 CAL. L. REV. 335, 339 (1952).

divest a court of jurisdiction.[3]

The court dismisses the distinction between individual rights and limitations on Congress's powers. It chooses to make no affirmative argument of its own, instead hoping to rebut the sizable body of conflicting authorities.

The court appears to believe that the Suspension Clause is just like the constitutional amendments that form the Bill of Rights.[4] It is a truism, of course, that individual rights like those

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[3] The court cites a number of cases for the proposition that the Attainder Clause confers an individual right instead of operating as a structural limitation on Congress. *See* Op. at 23 n.13. None of these cases makes the court's point. In *South Carolina v. Katzenbach,* 383 U.S. 301, 323-24 (1966), the Supreme Court held that it is not a bill of attainder for Congress to punish a state. This speaks to the definition of a bill of attainder and says nothing about the operation of the Attainder Clause. *Weaver v. Graham,* 450 U.S. 24, 30 (1981), says the opposite of what the court asserts. In *Weaver,* the Supreme Court emphasized that the *Ex Post Facto* Clause is not intended to protect individual rights but governs the operation of government institutions:

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

The Court also emphasized the structural nature of the limitations of Article I, section 9, in *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 469 (1977) (noting that "the Bill of Attainder Clause [is] ... one of the organizing principles of our system of government"). Unsurprisingly, the court cites no authority that would support its novel construction of section 9 by providing that certain individuals lack Attainder Clause or *Ex Post Facto* Clause rights.

[4] For this point, the court quotes, without context, from *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525 (1949), *see* Op. at 22. In that case, the Supreme Court emphasized that the Bill of Rights limited the powers

found in the first ten amendments work to limit Congress. However, individual rights are merely a subset of those matters that constrain the legislature. These two sets cannot be understood as coextensive unless the court is prepared to recognize such awkward individual rights as Commerce Clause rights, *see* U.S. CONST. art. I, § 8, cl. 3, or the personal right not to have a bill raising revenue that originates in the Senate, *see* U.S. CONST. art. I, § 7, cl. 1; *see also Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 224 (1974) (finding no individual right under the Ineligibility Clause).

That the Suspension Clause appears in Article I, section 9, is not happenstance. In Charles Pinckney's original proposal, suspension would have been part of the judiciary provision. It was moved in September 1789 by the Committee on Style and Arrangement, which gathered the restrictions on Congress's power in one location. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 128-32 (1980); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 596 (Max Farrand ed., rev. ed. 1966). By the court's reasoning, the Framers placed the Suspension Clause in Article I merely because there were no similar individual rights to accompany it. It is implausible that the Framers would have viewed the Suspension Clause, as the court implies, as a budding Bill of Rights but would not have assigned the provision its own section of the Constitution, much as they did with the only crime specified in the document, treason, which appears alone in Article III, section 3. Instead, the court must treat the Suspension Clause's placement in Article I, section 9, as a conscious determination of a limit on Congress's powers. The Supreme Court has found similar meaning in the placement of constitutional clauses ever since *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 419-21 (1819) (Necessary and Proper

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of Congress and did not affect the powers of the individual states, *H.P. Hood & Sons,* 336 U.S. at 534, at least until certain amendments were incorporated after ratification of the Fourteenth Amendment. This says nothing about the distinction, relevant here, between individual rights and limitations on Congress.

Clause); *see also, e.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 220-21 (1989) (Taxing Clause).

The court also alludes to the idea that the Suspension Clause cannot apply to foreign military conflicts because the exception extends only to cases of "Rebellion or Invasion." Op. at 21 n.11. The Framers understood that the privilege of the writ was of such great significance that its suspension should be strictly limited to circumstances where the peace and security of the Nation were jeopardized. Only after considering alternative proposals authorizing suspension "on the most urgent occasions" or forbidding suspension outright did the Framers agree to a narrow exception upon a finding of rebellion or invasion. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra,* at 438. Indeed, it would be curious if the Framers were implicitly sanctioning Executive-ordered detention abroad without judicial review by limiting suspension - and by the court's reasoning therefore limiting habeas corpus - to domestic events. To the contrary, as Alexander Hamilton foresaw in *The Federalist No. 84,* invoking William Blackstone,

> To bereave a man of life (says he), or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government.

THE FEDERALIST NO. 84, at 468 (E.H. Scott ed. 1898) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES * 131-32); *see also Ex parte Milligan,* 71 U.S. (4 Wall.) 2, 125 (1866).

B.

This court would have jurisdiction to address the detainees' claims but for Congress's enactment of the MCA. In *Rasul,* 542 U.S. at 483-84, the Supreme Court held that the federal district

courts had jurisdiction to hear petitions for writs of habeas corpus filed pursuant to 28 U.S.C. § 2241 by persons detained as "enemy combatants" by the United States at the Guantanamo Bay Naval Base. At the time, the habeas statute provided, in relevant part, that upon the filing of such a petition, the district court would promptly determine whether the petitioner was being held under the laws, Constitution, and treaties of the United States, utilizing the common-law procedure of a return filed by the government and a traverse filed by the petitioner. *See* 28 U.S.C. § § 2242-2253. After *Rasul,* Congress enacted the DTA, which purported to deprive the federal courts of habeas jurisdiction. DTA § 1005(e), 118 Stat. at 2741-43. The Supreme Court held in *Hamdan v. Rumsfeld,* 126 S. Ct. 2749, 2764-69 (2006), however, that the DTA does not apply retroactively, and so it does not disturb this court's jurisdiction over the instant appeals, which were already pending when the DTA became law.

As for the MCA, I concur in the court's conclusion that, notwithstanding the requirements that Congress speak clearly when it intends its action to apply retroactively, *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-73 (1994), and when withdrawing habeas jurisdiction from the courts, *see INS v. St. Cyr,* 533 U.S. 289, 299 (2001); *Ex parte Yerger,* 75 U.S. (8 Wall.) 85, 102 (1869), Congress sought in the MCA to revoke all federal jurisdiction retroactively as to the habeas petitions of detainees held at Guantanamo Bay. *See* Op. at 9-12. I do not join the court's reasoning. The court stresses Congress's emphasis that the provision setting the effective date for the jurisdictional change "shall apply to all cases, without exception." However, the absence of exceptions does not establish the scope of the provision itself. The entire provision reads:

> (b) - EFFECTIVE DATE. The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the

> enactment of this Act *which relate to* any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

MCA § 7(b), 120 Stat. at 2636 (emphasis added). Subsection (a), in turn, amends 28 U.S.C. § 2241(e), which confers habeas jurisdiction on the federal courts. New section 2241(e)(1) repeals "jurisdiction to hear or consider an application for a writ of habeas corpus." New section 2241(e)(2) repeals "jurisdiction to hear or consider any other action ... relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement."

The detainees suggest that by singling out habeas corpus in § 2241(e)(1) and by failing to do so in section 7(b) - and instead repeating the same list ("detention, transfer, treatment, trial, or conditions of confinement") that appears in § 2241(e)(2) - Congress was expressing its intent to make the MCA retroactive only as to § 2241(e)(2). This argument hinges on their view that a petition for a writ of habeas corpus is not "relating to any aspect of ... detention." But, by the plain text of section 7, it is clear that the detainees suggest ambiguity where there is none. As the court notes, *see* Op. at 11 n. 4, whereas § 2241(e)(1) refers to habeas corpus, § 2241(e)(2) deals with "any *other* action ... relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement." (Emphasis added). By omitting the word "other" in section 7(b), and by cross-referencing section 7(a) in its entirety, Congress signaled its intent for the retroactivity provision to apply to habeas corpus cases. This conclusion has nothing to do with Congress's emphasis that there are no exceptions and everything to do with the intent it expressed through the substantive provisions of the statute.

C.

The question, then, is whether by attempting to eliminate

all federal court jurisdiction to consider petitions for writs of habeas corpus, Congress has overstepped the boundary established by the Suspension Clause. The Supreme Court has stated on several occasions that "*at the absolute minimum,* the Suspension Clause protects the writ 'as it existed in 1789." ' *St. Cyr,* 533 U.S. at 301 (quoting *Felker v. Turpin,* 518 U.S. 651, 663-64 (1996)) (emphasis added). Therefore, at least insofar as habeas corpus exists and existed in 1789, Congress cannot suspend the writ without providing an adequate alternative except in the narrow exception specified in the Constitution.[5] This proscription applies equally to removing the writ itself and to removing all jurisdiction to issue the writ. *See United States v. Klein,* 80 U.S. (13 Wall.) 128 (1872). *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.2 (4th ed.2003).

1.

Assessing the state of the law in 1789 is no trivial feat, and the court's analysis today demonstrates how quickly a few missteps can obscure history. In conducting its historical review, the court emphasizes that no English cases predating 1789 award the relief that the detainees seek in their petitions. Op. at 15-17. "The short of the matter," the court concludes, is

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[5] It is unnecessary to resolve the question of whether the Constitution provides for an affirmative right to habeas corpus - either through the Suspension Clause, the Fifth Amendment guarantee of due process, or the Sixth Amendment - or presumed the continued vitality of this "writ antecedent to statute," *Williams v. Kaiser,* 323 U.S. 471, 484 n.2 (1945) (internal quotation marks omitted). Because the Supreme Court in *Rasul* held that the writ existed in 2004 and that there was, therefore, something to suspend, it is sufficient to assess whether the writ sought here existed in 1789. Given my conclusion, *see infra* Part C.1, it is also unnecessary to resolve the question of whether the Suspension Clause protects the writ of habeas corpus as it has developed since 1789. *Compare St. Cyr,* 533 U.S. at 304-05, *and LaGuerre v. Reno,* 164 F.3d 1035, 1038 (7th Cir.1998), *with Felker,* 518 U.S. at 663-64, *and* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens,* 98 COLUM. L. REV. 961, 970 (1998). The court oddly chooses to ignore the issue by truncating its reference to *St. Cyr,* without comment, and omitting the qualifier "at the absolute minimum." *See* Op. at 14.

that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." Op. at 17. But this misses the mark. There may well be no case at common law in which a court exercises jurisdiction over the habeas corpus claim of an alien from a friendly nation, who may himself be an enemy, who is captured abroad and held outside the sovereign territory of England but within the Crown's exclusive control without being charged with a crime or violation of the Laws of War. On the other hand, the court can point to no case where an English court has refused to exercise habeas jurisdiction because the enemy being held, while under the control of the Crown, was not within the Crown's dominions.[6] The paucity of direct precedent is a consequence of the unique confluence of events that defines the situation of these detainees and not a commentary on the reach of the writ at common law.

The question is whether by the process of inference from similar, if not identical, situations the reach of the writ at common law would have extended to the detainees' petitions. At common law, we know that "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Rasul,* 542 U.S. at 482 (quoting *Ex parte Mwenya,* [1960] 1

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[6] The court's assertion that "extraterritorial detention was not unknown in Eighteenth Century England," Op. at 18 n.9, is of no moment. The court references the 1667 impeachment of the Earl of Clarendon, Lord High Chancellor of England. *See id.* at 16, 18 n.9. Clarendon was accused of sending enemies to faraway lands to deprive them of effective legal process. The court makes the unsupported inference that habeas corpus was therefore unavailable abroad. Nothing in the Clarendon affair suggests that habeas corpus was sought and refused. Instead, as remains the case today, legal process can be evaded when prisoners are detained without access to the courts. That the detainees at Guantanamo were able to procure next friends and attorneys to pursue their petitions whereas seventeenth-century Englishmen would have found this difficult, if not impossible, says nothing about the availability of the writ at common law. The court's obfuscation as to the distinction between impracticality and unavailability is further addressed *infra.*

Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)). We also know that the writ extended not only to citizens of the realm, but to aliens, *see id.* at 481 & n.11, even in wartime, *see id.* at 474-75; *Case of Three Spanish Sailors,* 2 Black. W. 1324, 96 Eng. Rep. 775 (C.P. 1779); *Rex v. Schiever,* 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759). A War of 1812-era case in which Chief Justice John Marshall granted a habeas writ to a British subject establishes that even conceded enemies of the United States could test in its courts detention that they claimed was unauthorized. *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon,* 9 GREEN BAG 2D 39 (2005) (reporting *United States v. Williams* (C.C.D. Va. Dec. 4, 1813)).

To draw the ultimate conclusion as to whether the writ at common law would have extended to aliens under the control (if not within the sovereign territory) of the Crown requires piecing together the considerable circumstantial evidence, a step that the court is unwilling to take. Analysis of one of these cases, the 1759 English case of *Rex v. Schiever,* shows just how small this final inference is. Barnard Schiever was the subject of a neutral nation (Sweden), who was detained by the Crown when England was at war with France. *Schiever,* 2 Burr. at 765, 97 Eng. Rep. at 551. He claimed that his classification as a "prisoner of war" was factually inaccurate, because he "was desirous of entering into the service of the merchants of England" until he was seized on the high seas by a French privateer, which in turn was captured by the British Navy. *Id.* In an affidavit, he swore that his French captor "detained him[ ] against his will and inclination ... and treated him with so much severity[ ] that [his captor] would not suffer him to go on shore when in port ... but closely confined him to duty [on board the ship]." *Id.* at 765-66, 97 Eng. Rep. at 551. The habeas court ultimately determined, on the basis of Schiever's own testimony, that he was properly categorized and thus lawfully detained. *Id.* at 766, 97 Eng. Rep. at 551-52.

The court discounts *Schiever* because, after England captured the French privateer while en route to Norway, it was

carried into Liverpool, England, where Schiever was held in the town jail. *Id.*, 97 Eng. Rep. at 551. As such, the case did not involve "an alien outside the territory of the sovereign." Op. at 14-15. However, Schiever surely was not *voluntarily* brought into England, so his mere presence conferred no additional rights. As the Supreme Court observed in *Verdugo-Urquidez*, "involuntary [presence] is not the sort to indicate any substantial connection with our country." 494 U.S. at 271. Any gap between *Schiever* and the detainees' detention at Guantanamo Bay is thus exceedingly narrow.

This court need not make the final inference. It has already been made for us. In *Rasul*, the Supreme Court stated that "[a]pplication of the habeas statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus." 542 U.S. at 481. By reaching a contrary conclusion, the court ignores the settled principle that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003) (quoting *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997)) (internal quotation marks omitted). Even setting aside this principle, the court offers no convincing analysis to compel the contrary conclusion. The court makes three assertions: First, Lord Mansfield's opinion in *Rex v. Cowle*, 2 Burr. 834, 97 Eng. Rep. 587 (K.B.1759), disavows the right claimed by the detainees. Second, it would have been impractical for English courts to extend the writ extraterritorially. Third, *Johnson v. Eisentrager*, 339 U.S. 763 (1949), is controlling. None of these assertions withstands scrutiny.

In *Cowle*, Lord Mansfield wrote that "[t]here is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety." 2 Burr. at 856, 97 Eng. Rep. at 599. He noted thereafter, by way of qualification, that the writ would not extend "[t]o foreign dominions, which belong to a prince who succeeds to the throne of England." *Id.*, 97 Eng. Rep. at 599-600. Through the use of ellipsis marks, the court excises the

qualification and concludes that the writ does not extend "[t]o foreign dominions." Op. at 16. This masks two problems in its analysis. A "foreign dominion" is not a foreign country, as the court's reasoning implies, but rather "a country which at some time formed part of the dominions of a foreign state or potentate, but which by conquest or cession has become a part of the dominions of the Crown of England." *Ex parte Brown*, 5 B. & S. 280, 122 Eng. Rep. 835 (K.B. 1864). And the exception noted in Lord Mansfield's qualification has nothing to do with extraterritoriality: Instead, habeas from mainland courts was unnecessary for territories like Scotland that were controlled by princes in the line of succession because they had independent court systems. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *95-98; James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 512-13 (2006). In the modern-day parallel, where a suitable alternative for habeas exists, the writ need not extend. *See* 2 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT OXFORD 1767-1773, at 8 (Thomas M. Curley, ed., 1986) (quoting *Cowle* as indicating that, notwithstanding the power to issue the writ "in *Guernsey, Jersey, Minorca,* or the *plantations,*" courts would not think it "proper to interpose" because "the most usual way is to complain to the *king in Council,* the supreme court of appeal from those provincial governments"); *see also infra* Part C.2. The relationship between England and principalities was the only instance where it was "found necessary to restrict the scope of the writ." 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 124 (1938). *Cowle,* by its plain language, then, must be read as recognizing that the writ of habeas corpus ran even to places that were "no part of the realm," where the Crown's other writs did not run, nor did its laws apply. 2 Burr. at 835-36, 853-55, 97 Eng. Rep. at 587-88, 598-99. The Supreme Court has adopted this logical reading. *See Rasul,* 542 U.S. at 481-82; *see also* Mitchell B. Malachowski, *From Gitmo with Love: Redefining Habeas Corpus Jurisdiction in the Wake of the Enemy Combatant Cases of 2004,* 52 NAVAL L. REV. 118, 122-23

(2005).[7]

The court next disposes of *Cowle* and the historical record by suggesting that the "power" to issue the writ acknowledged by Lord Mansfield can be explained by the Habeas Corpus Act of 1679, 31 Car. 2, c. 2. *See* Op. at 16. The Supreme Court has stated that the Habeas Corpus Act "enforces the common law," *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1730), thus hardly suggesting that the "power" recognized by Lord Mansfield was statutory and not included within the 1789 scope of the common-law writ. To the extent that the court makes the curious argument that the Habeas Corpus Act would have made it too impractical to produce prisoners if applied extraterritorially because it imposed fines on jailers who did not quickly produce the body, Op. at 16-17, the court cites no precedent that suggests that "practical problems" eviscerate "the precious safeguard of personal liberty [for which] there is no higher duty than to maintain it unimpaired," *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). This line of reasoning employed by the court fails for two main reasons:

First, the Habeas Corpus Act of 1679 was expressly limited to those who "have beene committed for criminall or supposed criminall Matters." 31 Car. 2, c. 2, § 1. Hence, the burden of expediency imposed by the Act could scarcely have prevented

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[7] The significance of a 1794 opinion by the U.S. Attorney General, *see* Op. at 15, which expresses the view that the writ should issue to the foreign commander of a foreign ship-of-war in U.S. ports, reasoning that the foreign ship has "no exemption from the jurisdiction of the country into which he comes," 1 Op. Att'y Gen. 47 (1794), is unclear. Nor is it clear what point the court is making by referencing *In re Ning Yi-Ching*, 56 T.L.R. 3 (K.B. Vacation Ct. 1939). In *Rasul*, the Supreme Court noted that *Ning Yi-Ching* "made quite clear that 'the remedy of *habeas corpus* was not confined to British subjects,' but would extend to 'any person ... detained' within the reach of the writ," 542 U.S. at 483 n.13 (quoting *Ning Yi-Ching*, 56 T.L.R. at 5), and that the case does not support a "narrow view of the territorial reach of the writ," *id.* Here, the court provides a parenthetical quotation for *Ning Yi-Ching* that recalls a dissenting position from a prior case that was later repudiated. *See Rasul*, 542 U.S. at 483 n. 14; *Mwenya*, [1960] 1 Q.B. at 295 (Lord Evershed, M.R.).

common-law courts from exercising habeas jurisdiction in non-criminal matters such as the petitions in these appeals. Statutory habeas in English courts did not extend to non-criminal detention until the Habeas Corpus Act of 1816, 56 Geo. 3, c. 100, although courts continued to exercise their common-law powers in the interim. *See* 2 CHAMBERS, *supra,* at 11; 9 HOLDSWORTH, *supra,* at 121.

Second, there is ample evidence that the writ did issue to faraway lands. In *Ex parte Anderson,* 3 El. & El. 487, 121 Eng. Rep. 525 (Q.B. 1861), *superseded by statute,* 25 & 26 Vict., c. 20, § 1, the Court of Queen's Bench exercised its common-law powers to issue a writ of habeas corpus to Quebec in Upper Canada after expressly acknowledging that it was "sensible of the inconvenience which may result from such a step." *Id.* at 494-95, 121 Eng. Rep. at 527-28; *see also Brown,* 5 B. & S. 280, 122 Eng. Rep. 835 (issuing a writ to the Isle of Man in the sea between England and Ireland). English common-law courts also recognized the power to issue habeas corpus in India, even to non-subjects, and did so notwithstanding competition from local courts, well before England recognized its sovereignty in India. *See* B.N. PANDEY, THE INTRODUCTION OF ENGLISH LAW INTO INDIA 112, 149, 151 (1967); *see also Rex v. Mitter,* Morton 210 (Sup. Ct., Calcutta 1781), *reprinted in* 1 THE INDIAN DECISIONS (OLD SERIES) 1008 (T.A. Venkasawmy Row ed., 1911); *Rex v. Hastings,* Morton 206, 208-09 (Sup. Ct., Calcutta 1775) (opinion of Chambers, J.), *reprinted in* 1 THE INDIAN DECISIONS, *supra,* at 1005, 1007; *id.* at 209 (opinion of Impey, C.J.); Kal Raustiala, *The Geography of Justice,* 73 FORDHAM L. REV. 2501, 2530 n.156 (2005).

Finally, the court reasons that *Eisentrager* requires the conclusion that there is no constitutional right to habeas for those in the detainees' posture. *See* Op. at 17-18. In *Eisentrager,* the detainees claimed that they were "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus.*" 339 U.S. at 777. Thus *Eisentrager*

presented a far different question than confronts this court.[8] The detainees do not here contend that the Constitution accords them a positive right to the writ but rather that the Suspension Clause restricts Congress's power to eliminate a preexisting statutory right. To answer that question does not entail looking to the extent of the detainees' ties to the United States but rather requires understanding the scope of the writ of habeas corpus at common law in 1789. The court's reliance on *Eisentrager* is misplaced.

2.

This brings me to the question of whether, absent the writ, Congress has provided an adequate alternative procedure for challenging detention. If it so chooses, Congress may replace the privilege of habeas corpus with a commensurate procedure without overreaching its constitutional ambit. However, as the Supreme Court has cautioned, if a subject of Executive detention "were subject to any substantial procedural hurdles which ma[k]e his remedy ... less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered [under the Suspension Clause]." *Sanders v. United States,* 373 U.S. 1, 14 (1963).

The Supreme Court has, on three occasions, found a replacement to habeas corpus to be adequate. In *United States v. Hayman,* 342 U.S. 205 (1952), the Court reviewed 42 U.S.C. § 2255, which extinguished the writ as to those convicted of federal crimes before Article III judges in exchange for recourse before the sentencing court. Prior to the enactment of section 2255, the writ was available in the jurisdiction of detention, not the jurisdiction of conviction. The Court concluded that this substitute was acceptable in part because the traditional habeas remedy remained available by statute where section 2255 proved "inadequate or ineffective." *Id.* at 223. The Court came

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[8] To the extent that the court relies on *Eisentrager* as proof of its historical theory, the Supreme Court rejected that approach in *Rasul, see* 542 U.S. at 475-79.

to a similar conclusion in *Swain v. Pressley*, 430 U.S. 372 (1977), reviewing a statute with a similar "inadequate or ineffective" escape hatch, *id.* at 381 (reviewing D.C. CODE § 23-110). In that case, the Court concluded that a procedure for hearing habeas in the District of Columbia's courts, as distinct from the federal courts, was an adequate alternative. Finally, in *Felker*, 518 U.S. at 663-64, the Court found no Suspension Clause violation in the restrictions on successive petitions for the writ under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217, concluding that these were "well within the compass of [the] evolutionary process" of the habeas corpus protocol for abuse of the writ and did not impose upon the writ itself.

These cases provide little cover for the government. As the Supreme Court has stated, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. With this in mind, the government is mistaken in contending that the combatant status review tribunals ("CSRTs") established by the DTA suitably test the legitimacy of Executive detention. Far from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantanamo detainee with an assortment of handicaps that make the obstacles insurmountable.

At the core of the Great Writ is the ability to "inquire into illegal detention with a view to an order releasing the petitioner." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (internal quotation marks and alteration omitted). An examination of the CSRT procedure and this court's CSRT review powers reveals that these alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held.

"Petitioners in habeas corpus proceedings ... are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant

facts." *Harris v. Nelson,* 394 U.S. 286, 298 (1969). The offerings of CSRTs fall far short of this mark. Under the common law, when a detainee files a habeas petition, the burden shifts to the government to justify the detention in its return of the writ. When not facing an imminent trial,[9] the detainee then must be afforded an opportunity to traverse the writ, explaining why the grounds for detention are inadequate in fact or in law. *See, e.g.,* 28 U.S.C. § § 2243, 2248; *Bollman,* 8 U.S. (4 Cranch) at 125; *Ex parte Beeching,* 4 B. & C. 137, 107 Eng. Rep. 1010 (K.B. 1825); *Schiever,* 2 Burr. 765, 97 Eng. Rep. 551; *cf. Hamdi,* 542 U.S. at 537-38 (plurality opinion). A CSRT works quite differently. *See* Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf. The detainee bears the burden of coming forward with evidence explaining why he should *not* be detained. The detainee need not be informed of the basis for his detention (which may be classified), need not be allowed to introduce rebuttal evidence (which is sometimes deemed by the CSRT too impractical to acquire), and must proceed without the benefit of his own counsel.[10] Moreover, these proceedings occur before a board of military judges subject to command influence, *see Hamdan,* 126 S. Ct. at 2804, 2806 (Kennedy, J., concurring in part); *Weiss v. United States,* 510 U.S. 163, 179-80 (1994); *cf.* 10 U.S.C. § 837(a). Insofar as each of these practices impedes the process of

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[9] At common law, where criminal charges were pending, a prisoner filing a habeas writ would be remanded, although habeas incorporated a speedy-trial guarantee. *See, e.g., Ex parte Beeching,* 4 B. & C. 137, 107 Eng. Rep. 1010 (K.B. 1825); *Bushell's Case,* Vaugh. 135, 124 Eng. Rep. 1006, 1009-10 (C.P. 1670). *But see* MCA § 3(a)(1), 120 Stat. at 2602 (codified at 10 U.S.C. § 948b(d)(A)). Once there was "a judgment of conviction rendered by a court of general criminal jurisdiction," release under the writ was unavailable. *Hayman,* 342 U.S. at 210-11.

[10] With a few possible exceptions, the Guantanamo detainees before the federal courts are unlikely to be fluent in English or to be familiar with legal procedures and, as their detentions far from home and cut off from their families have been lengthy, they are likely ill prepared to be able to obtain evidence to support their claims that they are not enemies of the United States.

determining the true facts underlying the lawfulness of the challenged detention, they are inimical to the nature of habeas review.

This court's review of CSRT determinations, *see* DTA § 1005(e)(2), 119 Stat. at 2742, is not designed to cure these inadequacies. This court may review only the record developed by the CSRT to assess whether the CSRT has complied with its own standards. Because a detainee still has no means to present evidence rebutting the government's case - even assuming the detainee could learn of its contents - assessing whether the government has more evidence in its favor than the detainee is hardly the proper antidote. The fact that this court also may consider whether the CSRT process "is consistent with the Constitution and laws of the United States," DTA § 1005(e)(2)(C)(ii), 119 Stat. at 2742, does not obviate the need for habeas. Whereas a cognizable constitutional, statutory, or treaty violation could defeat the lawfulness of the government's cause for detention, the writ issues whenever the Executive lacks a lawful justification for continued detention. The provisions of DTA § 1005(e)(2) cannot be reconciled with the purpose of habeas corpus, as they handcuff attempts to combat "the great engines of judicial despotism," THE FEDERALIST NO. 83, at 456 (Alexander Hamilton) (E.H. Scott ed. 1898).

Additionally, and more significant still, continued detention may be justified by a CSRT on the basis of evidence resulting from torture. Testimony procured by coercion is notoriously unreliable and unspeakably inhumane. *See generally* INTELLIGENCE SCIENCE BOARD, EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART (2006), *available at* http://www.fas.org/irp/dni/educing.pdf. This basic point has long been recognized by the common law, which "has regarded torture and its fruits with abhorrence for over 500 years." *A. v. Sec'y of State,* [2006] 2 A.C. 221 ¶ 51 (H.L.) (appeal taken from Eng.) (Bingham, L.); *see also Hamdan,* 126 S. Ct. at 2786; *Jackson v. Denno,* 378 U.S. 368, 386 (1964); *Proceedings Against Felton,* 3 Howell's St. Tr. 367, 371 (1628) (Eng.); JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 73 (1977)

("Already in the fifteenth and sixteenth centuries, ... the celebrated Renaissance 'panegyrists' of English law were ... extolling the absence of torture in England.") (footnote omitted). The DTA implicitly endorses holding detainees on the basis of such evidence by including an anti-torture provision that applies only to future CSRTs. DTA § 1005(b)(2), 119 Stat. at 2741. Even for these future proceedings, however, the Secretary of Defense is required only to develop procedures to assess whether evidence obtained by torture is probative, not to require its exclusion. *Id.* § 1005(b)(1), 119 Stat. at 2741.

Even if the CSRT protocol were capable of assessing whether a detainee was unlawfully held and entitled to be released, it is not an adequate substitute for the habeas writ because this remedy is not guaranteed. Upon concluding that detention is unjustified, a habeas court "can only direct [the prisoner] to be discharged." *Bollman,* 8 U.S. (4 Cranch) at 136; *see also* 2 STORY, *supra,* § 1339. But neither the DTA nor the MCA require this, and a recent report studying CSRT records shows that when at least three detainees were found by CSRTs not to be enemy combatants, they were subjected to a second, and in one case a third, CSRT proceeding until they were finally found to be properly classified as enemy combatants. Mark Denbeaux et al., No-Hearing Hearings: CSRT: The Modern Habeas Corpus?, at 37-39 (2006), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

3.

Therefore, because Congress in enacting the MCA has revoked the privilege of the writ of habeas corpus where it would have issued under the common law in 1789, without providing an adequate alternative, the MCA is void unless Congress's action fits within the exception in the Suspension Clause: Congress may suspend the writ "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. However, Congress has not invoked this power.

Suspension has been an exceedingly rare event in the history of the United States. On only four occasions has Congress seen fit to suspend the writ. These examples follow a clear pattern: Each suspension has made specific reference to a state of "Rebellion" or "Invasion" and each suspension was limited to the duration of that necessity. In 1863, recognizing "the present rebellion," Congress authorized President Lincoln during the Civil War "whenever, in his judgment, the public safety may require it, ... to suspend the writ of habeas corpus." Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755. As a result, no writ was to issue "so long as said suspension by the President shall remain in force, and said rebellion continue." *Id.* In the Ku Klux Klan Act of 1871, Congress agreed to authorize suspension whenever "the unlawful combinations named [in the statute] shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State," finding that these circumstances "shall be deemed a rebellion against the government of the United States." Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 13, 14-15. Suspension was also authorized "when in cases of rebellion, insurrection, or invasion the public safety may require it" in two territories of the United States: the Philippines, Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692, and Hawaii, Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 141, 153 (1900); *see Duncan v. Kahanamoku*, 327 U.S. 304, 307-08 (1946). *See also* DUKER, *supra*, at 149, 178 n.190.

Because the MCA contains neither of these hallmarks of suspension, and because there is no indication that Congress sought to avail itself of the exception in the Suspension Clause, its attempt to revoke federal jurisdiction that the Supreme Court held to exist exceeds the powers of Congress. The MCA therefore has no effect on the jurisdiction of the federal courts to consider these petitions and their related appeals.

II.

In *In re Guantanamo Detainee Cases,* 355 F. Supp. 2d 443 (D.D.C. 2005), Judge Joyce Hens Green addressed eleven coordinated habeas cases involving 56 aliens being detained by the United States as "enemy combatants" at Guantanamo Bay, *id.* at 445. These detainees are citizens of friendly nations - Australia, Bahrain, Canada, Kuwait, Libya, Turkey, the United Kingdom, and Yemen - who were seized in Afghanistan, Bosnia and Herzegovina, The Gambia, Pakistan, Thailand, and Zambia. Each detainee maintains that he was wrongly classified as an "enemy combatant." Denying in part the government's motion to dismiss the petitions, the district court ruled:

> [T]he petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and ... the procedures implemented by the government to confirm that the petitioners are "enemy combatants" subject to indefinite detention violate the petitioners' rights to due process of law.

Id. at 445. The district court further ruled that the Taliban but not the al Qaeda detainees were entitled to the protections of the Third and Fourth Geneva Conventions. *Id.* at 478-80.

In *Khalid v. Bush,* 355 F. Supp. 2d 311 (D.D.C. 2005), Judge Richard J. Leon considered the habeas petitions of five Algerian-Bosnian citizens and one Algerian citizen with permanent Bosnian residency. They were arrested by Bosnian police in 2001 on suspicion of plotting to attack the United States and British embassies in Sarajevo. After the Supreme Court of the Federation of Bosnia and Herzegovina ordered the six men to be released in January 2002,[11] they were seized by United States forces and transported to Guantanamo Bay. The *Khalid* decision also covers the separate case of a French citizen seized in Pakistan and transported to Guantanamo Bay. Rejecting the petitioners' claim that their detention is

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[11] *See* Supreme Court of the Federation of Bosnia and Herzegovina, Sarajevo, Jan. 17, 2003, Ki-1001/01.

unjustified, the district court ruled that "no viable legal theory exists by which [the district court] could issue a writ of habeas corpus under" the circumstances presented, *id.* at 314, noting the President's powers under Article II, Congress's Authorization for the Use of Military Force ("AUMF"), and the Order on Detention (Nov. 13, 2001), *see id.* at 317-20. The district court granted the government's motion and dismissed the petitions. *Id.* at 316.

The fundamental question presented by a petition for a writ of habeas corpus is whether Executive detention is lawful. A far more difficult question is what serves to justify Executive detention under the law. At the margin, the precise constitutional bounds of Executive authority are unclear, *see Hamdan,* 126 S. Ct. at 2773-74; *id.* at 2786 (citing *Ex parte Quirin,* 317 U.S. 1, 28 (1942)), and the Executive detention at issue is the product of a unique situation in our history. Unlike the uniformed combat that is contemplated by the laws of war, *see generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed.1920), the Geneva Conventions, *e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, and the Constitution, *see* U.S. CONST. art. I, § 8, cl. 11, the United States confronts a stateless enemy in the war on terror that is difficult to identify and widely dispersed. *See Hamdi,* 519 U.S. at 519-20.

The parties recite in their several briefs the substantial competing interests of individual liberty and national security that are at stake, much as did the Supreme Court in *Hamdi,* 542 U.S. at 529-32 (plurality opinion); *see id.* at 544-45 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). In *Hamdi,* the plurality acknowledged that "core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Id.* at 531. At the same time, it acknowledged that for Hamdi "detention could last for the rest of his life." *Id.* at 520. Although Hamdi was a United States citizen, the premise underlying the conclusion that

there is a role for the judiciary, *id.* at 532-33, was that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat," *id.* at 530. In short, the nature of the conflict makes true enemies of the United States more troublesome. At the same time, the risk of wrongful detention of mere bystanders is acute, particularly where, as here, the Executive detains individuals without trial.

Parsing the role of the judiciary in this context is arduous. The power of the President is at its zenith, after all, when the President acts in the conduct of foreign affairs with the support of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Even assuming the AUMF and the Order on Detention provide such support for the detentions at issue, still the President's powers are not unlimited in wartime. *See, e.g., Milligan,* 71 U.S. (4 Wall.) at 125. The Founders could have granted plenary power to the President to confront emergency situations, but they did not; they could have authorized the suspension of habeas corpus during any state of war, but they limited suspension to cases of "Rebellion or Invasion." U.S. Const. art. I, § 9, cl. 2; *see* 2 STORY, *supra,* § 1342; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra,* at 341 (proposal of Charles Pinckney). Even in 1627, at a time when "[a]ll justice still flowed from the king [and] the courts merely dispensed that justice," DUKER, *supra,* at 44, the idea that a court would remand a prisoner merely because the Crown so ordered ("*per speciale mandatum Domini Regis*") was deemed to be inconsistent with the notion of a government under law. *See Darnel's Case,* 3 Howell's St. Tr. 1, 59 (K.B. 1627); MEADOR, *supra,* at 13-19. While judgments of military necessity are entitled to deference by the courts and while temporary custody during wartime may be justified in order properly to process those who have been captured, the Executive has had ample opportunity during the past five years during which the detainees have been held at Guantanamo Bay to determine who is being held and for what reason. *See, e.g., Hamdan,* 126 S. Ct.

at 2773; *cf. Hamdi*, 542 U.S. at 521.

Throughout history, courts reviewing the Executive detention of prisoners have engaged in searching factual review of the Executive's claims. In *Bollman*, the Supreme Court reviewed a petition of two alleged traitors accused of levying war against the United States. The petitioners were held in custody by the marshal but had not yet been charged. 8 U.S. (4 Cranch) at 75-76, 125. After the "testimony on which they were committed [was] fully examined and attentively considered," the Court ordered the prisoners released. *Id.* at 136-37. The 1759 English case of *Rex v. Schiever*, discussed *supra* Part I.C.1, also shows that habeas courts scrutinized the factual basis for the detention of even wartime prisoners. In *Schiever*, the court reviewed the prisoner's affidavit and took further testimony from a witness, who "sw[ore] that Schiever was forced against his inclination ... to serve on board [the French privateer]." 2 Burr. at 766, 97 Eng. Rep. at 551. Nonetheless, to the court it was clear that Schiever had, in fact, fought against England. As such, "the Court thought this man, upon his own shewing, clearly a prisoner of war and lawfully detained as such. Therefore they Denied the motion." *Id.*, 97 Eng. Rep. at 552 (footnote omitted). Similar themes and factual inquiry appear in *Three Spanish Sailors*, 2 Black. W. 1324, 96 Eng. Rep. 775, in which three alien petitioners submitted affidavits during wartime but failed to convince the court that they were not enemies of the Crown, and *Goldswain's Case*, 5 Black. W. 1207, 96 Eng. Rep. 711 (C.P. 1778), in which a wrongly impressed Englishman was released from service during wartime. *See also Beeching*, 4 B. & C. 137, 107 Eng. Rep. 1010.

In the early history of the United States, two cases further suggest that factual review accompanied even writs during wartime. In *United States v. Williams* (C.C.D. Va. Dec. 4, 1813), a previously unreported case researched for a recent essay in *The Green Bag*, Chief Justice John Marshall, riding circuit, released an enemy alien from detention by civil authorities. The Chief Justice concluded that "the regulations

made by the President of the United States respecting alien enemies [did] not authorize the confinement of the petitioner in this case." Neuman & Hobson, *supra,* at 42 (quoting the circuit court's order book). A majority of the Supreme Court of Pennsylvania, in *Lockington's Case,* 1 Brightly's (N.P.) 269 (Pa. 1813), agreed that alien enemies were entitled to a judgment on the merits as to whether their detention was justified,[12] and thereafter remanded the prisoners. *Id.* at 283-84 (Tilghman, C.J.); *id.* at 285, 293 (Yeates, J.).

The government maintains that a series of World War II-era cases undercuts the proposition that habeas review of uncharged detainees requires a factual assessment. It cites several cases in which courts have refused to engage in factual review of the findings of military tribunals imposing sentences under the laws of war. *See, e.g., Eisentrager,* 339 U.S. 763; *In re Yamashita,* 327 U.S. 1 (1945); *Quirin,* 317 U.S. at 25. There is good reason to treat differently a petition by an uncharged detainee - who could be held indefinitely without even the prospect of a trial or meaningful process - from that of a convicted war criminal. *See Rasul,* 542 U.S. at 476; *Omar v. Harvey,* No. 06-5126, slip op. at 13 (D.C. Cir. Feb. 9, 2007); *see also supra* note 9. For example, in *Yamashita,* the prisoner petitioned for a writ of habeas corpus only after a trial before a military tribunal where his six attorneys defended against 286 government witnesses. 327 U.S. at 5. *Quirin* involved a military commission, *see* 317 U.S. at 18-19, where the government presented "overwhelming" proof that included confessions from the German saboteurs. PIERCE O'DONNELL, IN TIME OF WAR 152-53, 165-66, 189 (2005). In *Eisentrager,* 339 U.S. at 766, the military tribunal conducted a trial lasting months. By contrast, the detainees have been charged with no crimes, nor are charges pending. The robustness of the review they have received to date differs by orders of magnitude from that of the

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[12] Prior to *Ableman v. Booth,* 62 U.S. (21 How.) 506 (1859), and *Tarble's Case,* 80 U.S. (13 Wall.) 397, 411-12 (1872), state courts regularly issued writs of habeas corpus as to federal prisoners.

military tribunal cases.[13]

The Supreme Court in *Rasul* did not address "whether and what further proceedings may become necessary after respondents make their responses to the merits of petitioners' claims," 542 U.S. at 485. The detainees cannot rest on due process under the Fifth Amendment. Although the district court in *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 454, made a contrary ruling, the Supreme Court in *Eisentrager* held that the Constitution does not afford rights to aliens in this context. 339 U.S. at 770; *accord Verdugo-Urquidez*, 494 U.S. at 269. Although in *Rasul* the Court cast doubt on the continuing

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[13] There is also good reason to distinguish between these detainees' cases and parallel cases where detainees have been accorded prisoner-of-war status and the benefits of Army Regulation 190-8, which implements the Third Geneva Convention. These provisions contemplate the end of hostilities and prisoner exchanges, *id.* §§ 3-11, 3-13, and provide for more extensive process for determining the status of prisoners, *id.* § 1-6. The regulations further specify that:

> Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying [Enemy Prisoner of War] status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

Id. § 1-6g. In *Hamdi*, the Supreme Court recognized that it was conceivable that procedures similar to Army Regulation 190-8 may suffice to provide due process to a citizen-detainee. 542 U.S. at 538 (plurality opinion); *id.* at 550-51 (Souter, J., with whom Ginsburg, J., joins, concurring in part, dissenting in part, and concurring in the judgment). Even assuming that according Guantanamo detainees rights under Army Regulation 190-8 would provide adequate and independent factual review of their claims sufficient to satisfy the dictates of habeas corpus, as well as any treaty obligations that the detainees are able to enforce, the Executive has declined to accord such detainees prisoner-of-war status, *see, e.g.*, The President's News Conference With Chairman Hamid Karzai of the Afghan Interim Authority, 1 PUB. PAPERS 121, 123 (Jan. 28, 2002).

vitality of *Eisentrager,* 542 U.S. at 475-79, absent an explicit statement by the Court that it intended to overrule *Eisentrager* 's constitutional holding, that holding is binding on this court. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 484 (1989); Op. at 21. Rather, the process that is due inheres in the nature of the writ and the inquiry it entails. The Court in *Rasul* held that federal court jurisdiction under 28 U.S.C. § 2241 is permitted for habeas petitions filed by detainees at Guantanamo, 542 U.S. at 485; *id.* at 488 (Kennedy, J., concurring in the judgment), and this result is undisturbed because the MCA is void. So long as the Executive can convince an independent Article III habeas judge that it has not acted unlawfully, it may continue to detain those alien enemy combatants who pose a continuing threat during the active engagement of the United States in the war on terror. *See id.* at 488 (Kennedy, J., concurring in the judgment); *cf. Hamdi,* 542 U.S. at 518-19. But it must make that showing and the detainees must be allowed a meaningful opportunity to respond. *See* MEADOR, *supra,* at 18; *see also Hamdi,* 542 U.S. at 525-26.

Therefore, I would hold that on remand the district courts shall follow the return and traverse procedures of 28 U.S.C. § 2241 *et seq.* In particular, upon application for a writ of habeas corpus, 28 U.S.C. § 2242, the district court shall issue an order to show cause, whereupon "[t]he person to whom the writ is or order is directed shall make a return certifying the true cause of the detention," *id.* § 2243. So long as the government "puts forth credible evidence that the [detainee] meets the enemy-combatant criteria," *Hamdi,* 542 U.S. at 533, the district court must accept the return as true "if not traversed" by the person detained. *Id.* § 2248. The district court may take evidence "orally or by deposition, or, in the discretion of the judge, by affidavit." *Id.* § 2246. The district court may conduct discovery. *See Harris,* 394 U.S. at 298-99; *cf.* Rules Governing Section 2254 Cases, R. 6-8; Rules Governing Section 2255 Cases, R. 6-8. Thereafter, "[t]he [district] court shall summarily hear and determine the facts, and dispose of the matter as law and justice

require."[14] District courts are well able to adjust these proceedings in light of the government's significant interests in guarding national security, as suggested in *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 467, by use of protective orders and ex parte and in camera review, *id.* at 471. The procedural mechanisms employed in that case, *see, e.g., id.* at 452 & n.12, should be employed again, as district courts must assure the basic fairness of the habeas proceedings, *see generally id.* at 468-78.

Accordingly, I respectfully dissent from the judgment vacating the district courts' decisions and dismissing these appeals for lack of jurisdiction.

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[14] Because the Suspension Clause question must be decided by the Supreme Court in the detainees' favor in order for the district court proceedings to occur, I leave for another day questions relating to the evolving and unlimited definition of "enemy combatant," *see Guantanamo Detainee Cases*, 355 F. Supp. 2d at 474-75, a detainee's inability to rebut evidence withheld on national security grounds, *see id.* at 468-72, as well as the detainees' claims under other statutes, international conventions, and treaties, and whether challenges to the conditions of confinement are cognizable in habeas. *Compare Khalid*, 355 F. Supp. 2d at 324-25, *with Miller v. Overholser*, 206 F.2d 415, 419-21 (D.C. Cir. 1953). Congressional action may also clarify matters. *See, e.g.*, S. 185, S. 576, 110th Cong. (2007).

APPENDIX H

UNITED STATES SUPREME COURT

(ORDER LIST: 550 U.S.)

Monday, April 30, 2007

CERTIORARI DENIED

06-462		TEXAS, ET AL. V. MEYERS, MARJORIE, ET AL.
06-740		LOPEZ-CANCINOS, YUMAN, ET AL. V. GONZALES, ATT'Y GEN.
06-769		WEEMS, DONALD, ET AL. V. JOHNSON, LAWRENCE, ET AL.
06-906		PRADILLA, CARLOS V. GONZALES, ATT'Y GEN., ET AL.
06-955		BUTLER, RONALD V. FLETCHER, ROBERT
06-1010	)	NIAGARA MOHAWK POWER, ET AL. V.
	)	FERC
06-1011	)	NEW YORK, ET AL. V. FERC
06-1110		MILLER-JENKINS, LISA V. MILLER-JENKINS, JANET
06-1121		GOODMAN, PHILLIP V. HBD INDUSTRIES, INC., ET AL.
06-1159		KAUFMANN'S CAROUSEL, ET AL. V. CITY OF SYRACUSE INDUSTRIAL DEV.

06-1160	NISSELSON, ALAN V. LERNOUT, JO, ET AL.
06-1161	P. M. REALTY & INVESTS., INC. V. TAMPA, FL
06-1165	McGIRT, JOE L., ET AL. V. GULF INS. CO., ET AL.
06-1168	BUFFALO TEACHERS FED., ET AL. V. TOBE, RICHARD, ET AL.
06-1170	CORY, BILL J. V. AZTEC STEEL BUILDING, INC.
06-1173	FINCH, DOROTHY I. V. BUECHEL, CHARLES A., ET AL.
06-1174	HORWITZ, KAREN V. IL STATE BD. OF ED., ET AL.
06-1177	GILLESPIE, VINCENT V. GILLESPIE, PEGGY R.
06-1179	HALL, ARIC W. V. CIVIL AIR PATROL, INC., ET AL.
06-1185	MICKENS, RONALD V. POLK COUNTY SCH. BD., ET AL.
06-1186	RHODES, ANTHONY V. ALABAMA
06-1256	ADAMS, EDWARD, ET AL. V. CHICAGO, IL
06-1259	NASCIMENTO, JOSEPH F. V. SUPREME COURT OF MT
06-1280	SHAPIRO, DAVID M. V. INGRAM, JUDGE

06-1297	KHOROZIAN, ANGELA V. UNITED STATES
06-1301	GURR, BERNARD V. UNITED STATES
06-8034	RANGEL-TOVAR, JAIME A. V. UNITED STATES
06-8507	CONSTANT, IVAN V. UNITED STATES
06-8710	GARZA-REYNA, CELEDINO V. UNITED STATES
06-8936	ROGERS, DAVID K. V. CALIFORNIA
06-9036	AMADOR, JOHN J. V. QUARTERMAN, DIR., TX DCJ
06-9074	DOLINSKA-MADURA, ANNA V. FULL SPECTRUM LENDING, INC.
06-9083	SANDERS, LUMMIE V. UNITED STATES
06-9089	SANDRES, NAOMI V. STATE OFFICE OF GENERAL COUNSEL
06-9146	OLIVER, ANTHONY C. V. CALIFORNIA
06-9173	LEWIS, ALBERT V. CALIFORNIA
06-9651	GUADALUPE, EDELMIRO V. PATRICK, SUPT., HOUTZDALE
06-9654	HURLSTON, KRISTOFFER V. McDONOUGH, SEC., FL DOC
06-9658	HARRIS, EDWARD E. V. CAIN, WARDEN
06-9660	IBEABUCHI, IKEMEFULA V. PALMER, WARDEN, ET AL.

06-9663	GILLIS, JOHN A. V. MICHIGAN
06-9664	HALES, MICHAEL V. BROOKS, SUPT., ALBION, ET AL.
06-9667	COOK, DARRELL W. V. JOHNSON, DIR., VA DOC
06-9670	COPLEY, DONALD R. V. MOORE, SUPT., NORTHEAST
06-9672	LEE, BOBBY V. DOTSON, WARDEN
06-9677	EARP, ALAN V. LAVAN, SUPT., DALLAS, ET AL.
06-9678	MITCHELL, ALBERT D. V. MICHIGAN
06-9682	ST. AUBIN, KEITH M. V. QUARTERMAN, DIR., TX DCJ
06-9696	PERKIS, ROBERT H. V. SIRMONS, WARDEN, ET AL.
06-9698	LUGO, EVANGELISTA V. CARRANZA, RODOLFO, ET AL.
06-9701	MACKEY, JOSEPH V. McDONOUGH, SEC., FL DOC
06-9702	JACKSON, WARREN L. V. McDONOUGH, SEC., FL DOC
06-9704	KING, GERALD V. LIVINGSTON, EXEC. DIR., TX DCJ
06-9705	BLANKENSHIP, SHAWN J. V. LOUISIANA
06-9709	WILLIAMS, ARTHUR L. V. GIURBINO, WARDEN

06-9711	McBRIDE, CHARLES E. V. McDONOUGH, SEC., FL DOC
06-9714	McNEIL, JAMAL V. FOLINO, SUPT., GREENE, ET AL.
06-9716	WITKOWSKI, BRUCE A. V. LAFLER, WARDEN
06-9717	WORRELL, DAVID P. V. MARYLAND
06-9724	HELMIG, DALE V. KEMNA, SUPT., CROSSROADS
06-9727	LOVETT, JOSEPH V. NEW JERSEY
06-9734	HOUGHTON, HENDERSON D. V. HURD, MARCIA
06-9736	GRAVES, JOMOKO T. V. WILLIAMS, WARDEN
06-9739	HOLLEY, GARFIELD W. V. JOHNSON, DIR., VA DOC
06-9743	FRIERSON, THIEL C. V. AVILES, J., ET AL.
06-9750	PERRY, LAURENCE B. V. HOREL, WARDEN
06-9755	SWEET, WILLIAM E. V. McDONOUGH, SEC., FL DOC, ET AL.
06-9757	SCOTT, JAMES D. V. OZMINT, DIR., SC DOC, ET AL.
06-9761	YOUNG, GREGORY L. V. SISTO, WARDEN
06-9763	ANDERSON, ERIC V. McDONOUGH, SEC., FL DOC

06-9766	BURDEN, SHANE V. CO DOC
06-9777	DeYOUNG, LARRY D. V. SCHRIRO, DIR., AZ DOC, ET AL.
06-9780	TILLMAN, TRAVIS V. HOFBAUER, WARDEN
06-9789	CLAYTON, FRANKLIN V. MI DOC
06-9791	ECHOLS, CARL V. KNIGHT, SUPT., PENDLETON
06-9798	LACEFIELD, PHILLIP V. NEW YORK TIMES, ET AL.
06-9803	TASKER, TINA E. V. MI DEPT. OF HUMAN SERVICES
06-9807	SCOTT, LUSTER V. ILLINOIS
06-9811	FOSTER, RONALD V. BUCHANAN, JUDGE, ETC.
06-9842	VILLAMIZAR-RAMIREZ, DANIEL V. GONZALES, ATT'Y GEN.
06-9951	SIMPSON, CHAD E. V. UNITED STATES
06-10052	HICKS, DAVID V. FENTY, MAYOR, ET AL.
06-10069	LITWA, ALAN V. REYNOLDS, SUPT., MOHAWK
06-10101	SNIPES, LEON V. PIERCE, WARDEN
06-10102	STANLEY, ALEXANDER V. COLORADO
06-10115	HILSKA, JOUKO M. V. SUTER, CLERK, USSC, ET AL.

06-10128	WIMS, JOHN C. V. UNITED STATES
06-10137	HOLLIMAN, FREDRICK M. V. UNITED STATES
06-10151	THRIFT, DANIEL J. V. UNITED STATES
06-10165	BROWN, JAMES D. V. UNITED STATES
06-10171	MONTAGUE, RAMON V. ILLINOIS
06-10175	OTTO, FRED J. V. UNITED STATES
06-10185	WILLIAMS, BOBBY A. V. RIDLEY-TURNER, EVELYN, ET AL.
06-10214	CLARK, TERRELL M. V. UNITED STATES
06-10225	WADE, CHARLES E. V. UNITED STATES
06-10258	DIAZ, RENE J. V. UNITED STATES
06-10271	LE, NGHIA V. UNITED STATES
06-10272	JORDAN, ERIC V. UNITED STATES
06-10274	LEDESMA, DIODAYAN V. UNITED STATES
06-10275	KLOSZEWSKI, GUSTAV V. DEPT. OF JUSTICE, ET AL.
06-10276	MASON, ALFONZO V. UNITED STATES
06-10278	NIGRO, JOHN V. UNITED STATES
06-10279	McDONALD, IAN V. UNITED STATES
06-10284	SCHUMANN, CARL E. V. UNITED STATES

06-10286	ROBINSON, CHARLES R. V. REVELL, WARDEN
06-10287	KIMBLE, DERRICK V. LAMANNA, WARDEN
06-10288	WELLS, DAMION V. UNITED STATES
06-10289	CHRISTIAN, RICKY D. V. UNITED STATES
06-10291	SIMS, PATRICK L. V. SHERMAN, WARDEN
06-10295	BOKMAN, SHAWN D. V. UNITED STATES
06-10297	PEREZ, ANDREW A. V. UNITED STATES
06-10308	BROWN, RICHARD O. V. UNITED STATES
06-10310	ASKEW, MAURICE V. UNITED STATES
06-10313	LUNA-RODRIGUEZ, ENRIQUE V. UNITED STATES
06-10318	VALENCIA, ALFREIDA B. V. UNITED STATES
06-10321	PERRY, PAUL F. V. UNITED STATES
06-10325	WEATHERSPOON, FLOYD V. UNITED STATES
06-10326	INGRAM, ERIC J. V. UNITED STATES
06-10327	HOUSTON, ALONZO V. UNITED STATES
06-10329	FUENTES, JOSEPH N. V. UNITED STATES
06-10331	GUERRA-MESTA, GUADALUPE V. UNITED STATES
06-10334	HICKS, ANTONIA D. V. UNITED STATES

06-10337	PORTER, HOWARD T. V. UNITED STATES
06-10339	PEREZ, MICHAEL V. UNITED STATES
06-10341	COLON, JESSE J. V. UNITED STATES
06-10344	GARRISON, LAWRENCE B. V. UNITED STATES
06-10348	BRAND, MATTHEW A. V. UNITED STATES
06-10349	GONZALEZ, LUIS M. V. UNITED STATES
06-10350	VUOLO, GERARD M. V. UNITED STATES
06-10351	ZAKHAROV, ANATOLI V. UNITED STATES
06-10352	HISHAW, CARLOS D. V. UNITED STATES
06-10354	GWATHNEY, CHARLES E. V. UNITED STATES
06-10358	GECHT, DAVID V. JONES, ASST. WARDEN
06-10360	ELSTON, JAMES E. V. UNITED STATES
06-10362	DONEL, JAMES T. V. UNITED STATES
06-10363	ERVIN, GARY V. UNITED STATES
06-10365	LIU, ZHIHAO V. UNITED STATES
06-10366	MAYERS-CARRILLO, LORENZO L. V. UNITED STATES
06-10369	ANDERSON, DON B. V. UNITED STATES
06-10377	IBARRA-GARCIA, MARTIN V. UNITED STATES

06-10381	GONZALEZ, MANUEL V. UNITED STATES
06-10383	GARCIA-ESTUPINON, EDUARDO V. UNITED STATES
06-10385	GADDY, ELIJAH J. V. UNITED STATES
06-10388	CASILLAS, JOHN A. V. UNITED STATES
06-10393	IN RE SEALED CASE
06-10394	HENDERSON, MICHAEL V. BOOKER, WARDEN
06-10397	MALLOY, GARY L. V. UNITED STATES
06-10400	WEBB, EARL V. UNITED STATES
06-10401	SPANO, MICHAEL V. UNITED STATES
06-10403	dEWILLIAMS, GARY V. MARTINEZ, WARDEN
06-10407	THORPE, JAMES V. UNITED STATES
06-10408	ANDREW, BRYSON V. UNITED STATES
06-10414	PEREZ-GONZALEZ, JUAN V. UNITED STATES
06-10418	LOPEZ, HECTOR R. V. UNITED STATES
06-10429	ARCE-LEON, SAMUEL V. UNITED STATES
06-10431	VANDRY, CYNTHIA C. V. UNITED STATES
06-10433	THOMPSON, CORRY V. UNITED STATES
06-10434	HERNANDEZ, ANDY V. UNITED STATES

The petitions for writs of certiorari are denied.

06-736) EPA V. NEW YORK, ET AL.
)
06-750) UTILITY AIR REGULATORY GROUP V. NEW YORK, ET AL.

The petitions for writs of certiorari are denied. The Chief Justice took no part in the consideration or decision of these petitions.

06-1169 HAMDAN, SALIM A. V. GATES, SEC. OF DEFENSE, ET AL.

The petition for a writ of certiorari is denied. Justice Souter, Justice Ginsburg, and Justice Breyer would grant the petition for a writ of certiorari.

06-1176 HIGH COUNTRY ALLIANCE, ET AL. V. CLARKE, KATHLEEN, ET AL.

The motion of Administrative Law and Public Lands Law Professors for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied.

06-9729 SIVAK, LACEY M. V. SONNEN, PAM, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

06-9730 SIVAK, LACEY M. V. DEFENDANT A

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (*per curiam*). Justice Stevens dissents. See *id.*, at 4, and cases cited therein.

06-9737 HARRIS, DAVID G. V. QUARTERMAN, DIR., TX DCJ

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

APPENDIX I

UNITED STATES SUPREME COURT

(ORDER LIST: 551 U.S.)

Friday, June 29, 2007

CERTIORARI GRANTED

06-1195) BOUMEDIENE, LAKHDAR, ET AL. V. BUSH PRESIDENT OF U.S., ET AL.
)
06-1196) AL ODAH, KHALED A. F., ET AL. V UNITED STATES, ET AL.

The petitions for rehearing are granted. The orders entered April 2, 2007, denying the petitions for writs of certiorari are vacated. The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument. As it would be of material assistance to consult any decision in *Bismullah, et al., v. Gates*, No. 06-1197, and *Parhat, et al., v. Gates*, No. 06-1397, currently pending in the United States Court of Appeals for the District of Columbia Circuit, supplemental briefing will be scheduled upon the issuance of any decision in those cases.

Supreme Court, U.S.
FILED
JUL 23 2007
OFFICE OF THE CLERK

No. 07-15

In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner may file a second, duplicative petition for a writ of certiorari before judgment, just three months after his previous petition was denied and while his appeal is still held in abeyance (at his request) by the court of appeals.

2. Whether the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, removes federal court jurisdiction over habeas corpus petitions filed by aliens detained as enemy combatants at Guantanamo Bay, Cuba.

3. Whether aliens detained as enemy combatants at Guantanamo Bay have rights under the Suspension Clause of Article I, Section 9, of the Constitution.

4. Whether, if aliens detained at Guantanamo Bay have such rights, the MCA violates the Suspension Clause.

5. Whether petitioners may challenge the adequacy of the judicial review available under the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, before they have sought to invoke, much less exhaust, such review.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Boumediene v. *Bush*:
476 F.3d 981 (D.C. Cir. 2007) 6
127 S. Ct 1478 (2007) 8
Foretich v. *United States*, 351 F.3d 1198 (D.C. Cir. 2003) 14
Hamdan v. *Gates*, 127 S. Ct. 2133 (2007) 8, 13
Hamdan v. *Rumsfeld*, 126 S. Ct. 2749 (2006) 2, 3, 4, 14
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 6, 7
Matthews v. *Diaz*, 426 U.S. 67 (1976) 15
Nixon v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977) 15
Rasul v. *Bush*, 542 U.S. 466 (2004) 7
Selective Serv. Sys. v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841 (1984) 15
United States v. *Lovett*, 328 U.S. 303 (1946) 14

Constitution, treaty, statutes and rule:

U.S. Const.:
Art. I, § 9:
Cl. 2 (Suspension Clause) 6, 7

Constitution, treaty, statutes and rule—Continued: Page

Cl. 3 (Bill of Attainder Clause) 13
Amend. V (Due Process Clause) 13, 15
Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 2
Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739:
§ 1005(e)(1), 119 Stat. 2742 3
§ 1005(e)(2), 119 Stat. 2742 ..... 3, 4
§ 1005(e)(2)(A), 119 Stat. 2742 3
§ 1005(e)(2)(C), 119 Stat. 2742 3
§ 1005(e)(3), 119 Stat. 2743 4
§ 1005(e)(3)(A), 119 Stat. 2743 3
Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 4
§ 3, 120 Stat. 2600-2631 (to be codified at 10 U.S.C. ch. 47a (2006)) 4, 5
§ 4, 120 Stat. 2631 5
§ 7, 120 Stat. 2635-2636 ..... 14, 15
§ 7(a), 120 Stat. 2635 ..... 4, 6, 15
§ 7(a), 120 Stat. 2636 ..... 4, 11
§ 7(b), 120 Stat. 2636 ..... 4, 6
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* 2
28 U.S.C. 2241 4
Sup. Ct. R. 11 ..... 9, 10

Miscellaneous: Page

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (2001) 2

Memorandum from Deputy Secretary of Defense Paul Wolfowitz, re: Order Establishing Combatant Status Review Tribunal (July 7, 2004) 2

In the Supreme Court of the United States

No. 07-15

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v.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. App. 1a-16a) is reported at 464 F. Supp. 2d 9.

JURISDICTION

This second and successive petition for a writ of certiorari before judgment was filed on July 2, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

1. Petitioner, a Yemeni national, was captured in Afghanistan in November 2001 and then transported to the Guantanamo Bay Naval Base in Cuba. Pet. App. 1a. At Guantanamo Bay, petitioner was given a formal adjudicatory hearing before a Combatant Status Review Tribunal (CSRT), which determined that he is an enemy

combatant. Indeed, petitioner has admitted that he was a personal assistant to Osama bin Laden. For purposes of the CSRT, an enemy combatant is "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2761 n.1 (2006) (quoting Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunal (July 7, 2004)).

In July 2003, acting pursuant to an executive order providing for the establishment of military commissions to try members of al Qaeda and others involved in international terrorism against the United States, see *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (2001), the President designated petitioner for trial before a military commission. See *Hamdan*, 126 S. Ct. at 2760. Petitioner was charged with a conspiracy to commit attacks on civilians and civilian objects, murder by an unprivileged belligerent, and terrorism. *Id.* at 2761. The charge was based on his direct connection as bodyguard and driver to Osama bin Laden, and his participation in al Qaeda's campaign of international terrorism against the United States, including transporting weapons for al Qaeda. *Ibid.*

2. Petitioner filed a petition for habeas corpus and/or mandamus, alleging in relevant part that the President lacks authority to try him before a military commission, rather than by a court-martial convened under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, and that the military-commission procedures violate the Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T.

3316, 75 U.N.T.S. 135 (Geneva Convention). See *Hamdan*, 126 S. Ct. at 2759. The district court granted petitioner's habeas petition and stayed the military-commission proceedings. *Id.* at 2761. The court of appeals reversed, and this Court granted review. See *id.* at 2762.

3. While petitioner's case was pending in this Court, Congress enacted the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739. Section 1005(e)(1) of the DTA amended the federal habeas corpus statute to provide that "no court, justice, or judge shall have jurisdiction" to consider habeas petitions filed by aliens detained at Guantanamo Bay. DTA § 1005(e)(1), 119 Stat. 2742.

Section 1005(e)(2) of the DTA provides that the Court of Appeals for the District of Columbia Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." DTA § 1005(e)(2)(A), 119 Stat. 2742. The DTA specifies that the court of appeals may determine whether a final CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," and, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C), 119 Stat. 2742. Section 1005(e)(3) creates a parallel exclusive-review mechanism for Guantanamo Bay detainees seeking to challenge final criminal convictions issued by military commissions. § 1005(e)(3)(A), 119 Stat. 2743.

4. In June 2006, this Court held that Section 1005(e)(1) of the DTA does not apply to habeas claims

filed before the DTA was enacted. See *Hamdan*, 126 S. Ct. at 2762-2769. On the merits, the Court further held that the military commission convened to try petitioner for conspiring to violate the laws of war could not proceed because it was not authorized by Congress. See *id.* at 2772-2798.

5. In the wake of this Court's decision, Congress enacted the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600. Section 7(a) of the MCA, 120 Stat. 2635, amends 28 U.S.C. 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." Section 7(a) also removes federal court jurisdiction, except as provided by Section 1005(e)(2) and (3) of the DTA, over "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. MCA § 7(a), 120 Stat. 2636. The MCA further provides that these amendments "shall take effect on the date of the enactment of this Act," and that they "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." § 7(b), 120 Stat. 2636.

The MCA also established a detailed regime governing the establishment and conduct of military commissions, creating within the Uniform Code of Military Justice a chapter on "Military Commissions." See MCA § 3,

120 Stat. 2600-2631 (to be codified at 10 U.S.C. ch. 47A (2006)). That chapter establishes requirements for military commissions distinct from and in the place of the UCMJ court-martial provisions. See § 4, 120 Stat. 2631 (amending various provisions of UCMJ pertaining to courts-martial to make clear that they do not apply to military commissions under the MCA).

6. On remand, the district court held that the MCA removes federal jurisdiction over petitioner's habeas case, and it dismissed his petition for lack of subject-matter jurisdiction. Pet. App. 1a-16a. The court held that the MCA was intended to remove statutory jurisdiction over habeas petitions filed by aliens detained as enemy combatants. *Id.* at 3a-5a. The court further held that Congress did not intend the MCA to suspend any constitutional right to the writ of habeas corpus, *id.* at 5a-11a, but concluded that petitioner, as an alien captured and detained outside the sovereign territory of the United States, has no constitutional rights under the Suspension Clause, *id.* at 11a-15a. Accordingly, the court concluded it was without jurisdiction and dismissed petitioner's habeas petition. *Id.* at 15a-16a.

Petitioner filed a notice of appeal from the district court's dismissal of his petition, Pet. App. 30a-31a, but moved to hold his appeal in abeyance pending the court of appeals' resolution of *Boumediene* v. *Bush*, No. 05-5062 (D.C. Cir.) and *Al Odah* v. *United States*, No. 05-5064 (D.C. Cir.). 07-5042 Mot. to Hold Appeal in Abeyance (D.C. Cir. filed Feb. 6, 2007). The court granted his motion. See 07-5042 Order (D.C. Cir. Mar. 22, 2007).

7. On February 2, 2007, new charges were sworn against petitioner under the MCA, charging him with

conspiracy and providing material support for terrorism. Pet. App. 32a, 38a-44a.[1]

8. On February 20, 2007, the D.C. Circuit issued its decision in *Boumediene* v. *Bush*, 476 F.3d 981. See Pet. App. 52a-102a. The court held that the MCA applies to the detainees' pending habeas cases—each of which "relates to an 'aspect' of detention and * * * deals with the detention of an 'alien' after September 11, 2001," *id.* at 58a—and thus removes federal court jurisdiction over their petitions, *id.* at 58a-61a. The court explained that Section 7(b) specifies the effective date of Section 7(a), which removes federal jurisdiction over both habeas and all other detention-related claims in "all cases, without exception." *Id.* at 59a.

The court of appeals further held that the MCA is consistent with the Suspension Clause, for two reasons. First, as aliens outside the sovereign territory of the United States, the detainees have no constitutional rights under that clause. Pet. App. 66a (citing, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)). Second, even if the detainees had constitutional rights under the Suspension Clause, the clause would not protect a right to the writ in these circumstances. As the court explained, "the Suspension Clause protects the writ 'as it existed in 1789,'" *id.* at 62a, but "the history of the writ in England prior to the founding" shows that "habeas

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[1] Last month, the military-commission judge dismissed the charges against petitioner without prejudice after determining that the military commission lacked jurisdiction. The judge held that petitioner's CSRT had determined him to be an "enemy combatant," rather than an "unlawful enemy combatant," as required for the military commission's jurisdiction. *United States* v. *Hamdan*, Decision and Order—Motion to Dismiss for Lack of Jurisdiction (Military Comm'n June 4, 2007). The United States has moved for reconsideration of that order.

corpus would not have been available in 1789 to aliens without presence or property within the United States." *Id.* at 64a-65a.

The court further explained that this Court's decision in *Eisentrager* "ends any doubt about the scope of common law habeas." Pet. App. 65a. In *Eisentrager*, this Court stated that it was aware of "no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right." *Eisentrager*, 339 U.S. at 768.

The court of appeals held that the detainees' reliance on this Court's decision in *Rasul* v. *Bush*, 542 U.S. 466 (2004), was misplaced. Pet. App. 65a. The court explained that *Rasul* interpreted only the statutory right to habeas, so it "could not possibly have affected the constitutional holding of *Eisentrager*," *id.* at 67a n.10, in which the Court explicitly held that aliens detained outside the sovereign territory of the United States do not have a constitutionally protected right to the writ, see 339 U.S. at 781.

Having concluded that the MCA removes jurisdiction in the detainees' cases, the court vacated the district courts' decisions and dismissed the cases for want of jurisdiction. Pet. App. 71a-72a.

Judge Rogers dissented. She agreed that Congress intended the MCA to withdraw federal jurisdiction over the detainees' claims, but she found the statute to be inconsistent with the Suspension Clause, because "Congress has neither provided an adequate alternative remedy * * * nor invoked the exception to the Clause by

making the required findings to suspend the writ." Pet. App. 73a.

9. On March 5, 2007, the detainees in *Boumediene* and *Al Odah* filed a petition for a writ of certiorari with this Court. A short time earlier, petitioner, joined by one of the detainees in *Boumediene* and *Al Odah*, had filed a petition for a writ of certiorari and a writ of certiorari before judgment. This Court denied certiorari in *Boumediene* and *Al Odah* on April 2, 2007, and denied certiorari in petitioner's case on on April 30, 2007. See *Boumediene* v. *Bush*, 127 S. Ct. 1478; *Hamdan* v. *Gates*, 127 S. Ct. 2133. Petitioner thereafter petitioned the D.C. Circuit to hear his appeal en banc and reverse *Boumediene* or, in the alternative, to summarily affirm the dismissal of his habeas petition pursuant to *Boumediene*. See 07-5042 Petition for Initial Hr'g En Banc (D.C. Cir. filed June 8, 2007). That petition remains pending before the court.

10. The detainees in *Boumediene* and *Al Odah* filed petitions for rehearing of the denial of certiorari. On June 29, 2007, this Court granted those petitions and granted certiorari in *Boumediene* and *Al Odah*. Pet. App. 116a. On July 2, 2007, petitioner filed a motion for leave to file an out-of-time petition for rehearing of the denial of certiorari and a second petition for certiorari before judgment.

ARGUMENT

Petitioner makes the extraordinary request, for the third time in the course of this litigation and the second time this year, that this Court grant a writ of certiorari before judgment. This Court's rules provide that a petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such im-

perative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Petitioner has not come close to meeting that standard. His original petition, which presented arguments virtually identical to those raised here, was denied three months ago. See *Hamdan* v. *Gates*, 127 S. Ct. 2133 (2007). The only significant development since that time is this Court's decision to grant review in *Boumediene* v. *Bush*, No. 06-1195, and *Al Odah* v. *United States*, No. 06-1196. But the pendency of those cases makes a grant of review in this case even less appropriate. There is no reason to grant petitioner's renewed request now.

1. This Court should decline to consider the merits of this petition and deny it based on its successive nature alone. This is the second time that petitioner has sought certiorari before judgment in the court of appeals in this case. There is no basis for filing a *second* (and duplicative) petition for certiorari before judgment within three months of the Court's denial of a first petition, particularly when the petition is premised on virtually identical grounds. Indeed, it is not even clear that the Court's rules permit the filing of such a duplicative petition for certiorari before judgment. This successive petition seems designed primarily to avoid the time limits on filing a petition for rehearing. In the case of a petition after judgment, such a second petition would be untimely, and a *timely* petition for rehearing would be the only avenue for reconsideration. In light of the substantially higher hurdle to granting certiorari before judgment, it makes no sense to treat the *absence* of a

judgment as a circumstance that puts a petitioner in a more favorable procedural posture.[2]

Petitioner presents no basis for his new, second petition. The only circumstance that has changed since petitioner's first petition is that this Court has granted certiorari in *Boumediene* and *Al Odah*. But, as explained below, that development counsels against, rather than in favor of, granting certiorari and expedition of petitioner's case.

2. Petitioner asserts (Pet. 5-6) that his petition raises issues of "imperative public importance," Sup. Ct. R. 11, namely, "whether the federal courts have any jurisdiction—constitutional or statutory—to consider habeas petitions filed by Guantanamo Bay detainees." But this Court will consider precisely those issues in *Boumediene* and *Al Odah*. See, *e.g.*, 06-1195 Pet. at i, *Boumediene, supra* (describing the question presented as "[w]hether the [MCA] validly stripped federal court jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at the United States Naval Station at Guantanamo Bay"). There is no need to grant this petition and expedite the case in order to review the same basic issues before the Court in *Boumediene* and *Al Odah*. Contrary to petitioner's assertion (Mot. to Expedite 3-6), there would be no "efficiencies gained" by briefing and considering the same issues pending in *Boumediene* and *Al Odah*. Certainly, duplicating review of the same issues is not "of such imperative public importance as to justify deviation from normal appellate practice," Sup. Ct. R. 11, by granting the petition for a writ of certiorari before judgment.

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[2] Respondents have filed a separate opposition to petitioner's motion to file an out-of-time petition for rehearing from the denial of his earlier petition for a writ of certiorari before judgment.

Petitioner contends (Pet. 9) that his case is a "necessary counterpart" to this Court's review of *Boumediene* and *Al Odah* because the petitioners in those cases challenge the MCA's elimination of habeas jurisdiction only as it relates to aliens detained as enemy combatants. Petitioner, of course, is detained as an enemy combatant at Guantanamo Bay and is in exactly the same position as the detainees in *Boumediene* and *Al Odah* insofar as he challenges his detention. The fact that he is also subject to trial by military commission does not distinguish his case from those of the detainees in *Boumediene* and *Al Odah*. The jurisdictional provision of the MCA makes no distinction between aliens detained as enemy combatants and those who are also subject to trial by military commission, see MCA § 7(a), 120 Stat. 2636, and petitioner provides no reason why any decision of this Court in *Boumediene* and *Al Odah* would not apply to him. Indeed, in the court of appeals, petitioner has conceded that the issues resolved in *Boumediene* and *Al Odah* will control his case. See 07-5042 Pet. for Initial Hr'g En Banc 6 (arguing that the "question [in *Boumediene*] does not distinguish between those detainees challenging the CSRT process and a detainee challenging the legality of a military commission trial, and is therefore broad enough to cover [petitioner's] claims").

Petitioner suggests (Pet. 6) that review of his case is necessary because otherwise, if this Court were to rule in *Boumediene* and *Al Odah* that aliens detained as enemy combatants have constitutional habeas rights, "the government could immediately charge those individuals before military commissions and escape the ambit of the Court's ruling." That is mistaken. The government has never suggested that the pendency of military-commission charges against a detainee would by itself preclude

him from challenging his enemy-combatant status in a habeas petition. Indeed, petitioner already has such charges pending against him, and the government has never sought dismissal of his habeas case on that basis. If this Court holds in *Boumediene* and *Al Odah* that enemy combatants at Guantanamo Bay may petition for habeas corpus to challenge their detention notwithstanding the MCA, there is no reason to suppose that its holding would not apply to those enemy combatants who have been designated for trial by military commission.

Thus, even though the Court has granted review in *Boumediene* and *Al Odah*, there is no reason for the Court to grant review in this case, which raises the same legal issues, particularly insofar as a grant of certiorari would require the extraordinary step of granting review before judgment. If petitioner wishes to submit his views on the proper resolution of those issues, he may file an *amicus* brief in *Boumediene* and *Al Odah* providing those views.

3. Ordinarily, it would be appropriate for the Court to hold a petition raising the same issues as a case that has already been accepted for review. This petition, however, seeks a writ of certiorari before judgment in the court of appeals. Once this Court decides *Boumediene* and *Al Odah*, the court of appeals will be able to apply this Court's rulings in deciding petitioner's case. Significantly, petitioner does not even allege that any irreparable harm will result as a consequence of waiting to seek certiorari after the court of appeals reviews the district court's dismissal of his habeas petition, or until after this Court reviews *Boumediene* and *Al*

Odah.[3] There is therefore no reason to hold this petition.

4. To the extent this petition seeks to present issues different from those in *Boumediene* and *Al Odah*, those issues are secondary to the threshold issues presented in *Boumediene* and *Al Odah* and do not warrant review.[4] Although the thrust of petitioner's petition is the same questions presented in *Boumediene* and *Al Odah*, see Pet. i, 6, petitioner contends (Pet. 10, 23-28) that his petition also raises important legal issues beyond those presented in the *Boumediene* and *Al Odah* petitions—specifically, the validity of the MCA under separation of powers principles, the Bill of Attainder Clause, and the equal-protection component of the Due Process Clause. The court of appeals in *Boumediene* and *Al Odah*, however, determined that Guantanamo Bay detainees, as aliens detained outside the sovereign terri-

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[3] As we explained in our opposition to petitioner's earlier petition, the availability of review under the DTA and the MCA means that petitioner would not suffer any harm from delaying consideration of his habeas action until he has completed DTA procedures. See Br. in Opp. at 14-16, *Hamdan* v. *Gates*, 127 S. Ct. 2133 (2007) (No. 06-1169). It follows *a fortiori* that he will not suffer irreparable harm from delaying review until the court of appeals has issued a final judgment.

[4] Petitioner argues (Pet. 21-23) that review under the DTA and MCA is not an adequate substitute for habeas, but his arguments add little to the arguments the Court will consider in *Boumediene* and *Al Odah*. Indeed, petitioner himself considers his arguments to be similar to those asserted by the *Boumediene* and *Al Odah* petitioners. See Pet. 21 ("Just as with the *Boumediene* and *Al Odah* challenges to the CSRT procedures, the Government cannot avoid Petitioner's Suspension Clause argument on the theory that the MCA provides an adequate substitute for habeas challenges to the military commission process."). In any event, those arguments lack merit for the reasons set out in our opposition to petitioner's earlier petition. See Br. in Opp. at 23-26, *Hamdan* v. *Gates*, *supra* (No. 06-1169).

tory of the United States, lack any constitutional rights. Pet. App. 66a. This Court's review of that ruling, therefore, might well resolve the additional constitutional claims asserted by petitioner.

In any event, the "additional" issues asserted are without merit and do not warrant plenary review, much less review before the court of appeals has had an opportunity to consider them. Petitioner argues that the MCA violates separation of powers by preventing the courts from implementing this Court's ruling in *Hamdan* v. *Rumsfeld*, which, in his view, held that the Geneva Conventions are judicially enforceable. Pet. 25-26; see 126 S. Ct. at 2796. But contrary to petitioner's suggestion, *Hamdan* did not hold that the Geneva Conventions are generally judicially enforceable by private parties. On the contrary, the Court explicitly assumed just the opposite. See *Id.* at 2794 ("[A]bsent some other provision of law," the Geneva Conventions do not "furnish[] petitioner with any enforceable right.").

Petitioner's Bill of Attainder argument is similarly baseless. Section 7 of the MCA does not contain either of the required elements of a bill of attainder: it neither singles out petitioner nor imposes punishment. 120 Stat. 2635-2636. The MCA does not apply "either to named individuals or to easily ascertainable members of a group." *United States* v. *Lovett*, 328 U.S. 303, 315 (1946); see *Foretich* v. *United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003) ("Both 'specificity' and 'punishment' must be shown before a law is condemned as a bill of attainder."). Rather, Section 7 of the MCA is a jurisdictional provision that applies to an open-ended class of individuals: aliens determined by administrative processes to be enemy combatants or who are being held as enemy combatants while awaiting such determinations.

120 Stat. 2635-2636. Moreover, that provision simply specifies the forum in which permissible claims by enemy combatants must be brought and clarifies the scope of that review. It does not impose any of the types of punishment that this Court has found to be covered by the Bill of Attainder Clause. See *Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 474 (1977).

Even assuming that petitioner has constitutional rights under the Fifth Amendment, his equal-protection claim likewise fails. The MCA does not deprive aliens of any fundamental constitutional habeas right, because even if aliens held outside the United States as enemy combatants have a constitutional right to habeas, the MCA provides adequate and appropriate substitute relief. Further, petitioner is not a member of a suspect class—federal classifications on the basis of alienage are subject only to rational-basis review. See *Matthews* v. *Diaz*, 426 U.S. 67 (1976).

Finally, even if these additional issues warranted this Court's review, this case would be a poor vehicle for considering them. While petitioner did raise these arguments in the district court, the district court had no occasion to consider them, because it found that Section 7(a) of the MCA—the same provision at issue in the *Boumediene* and *Al Odah* decisions—deprived it of jurisdiction. See Pet. App. 15a-16a n.16. And petitioner's appeal has yet to be briefed, much less decided, by the court of appeals. As a result, the issues petitioner seeks to raise here have not previously been addressed by *any* court. They surely would benefit from the normal decisional process that a case undergoes before receiving plenary review by this Court. The Court should not re-

solve those claims in the first instance, but should await a decision by the court of appeals.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied. In the alternative, the petition should be held pending the disposition of *Boumediene* v. *Bush*, No. 06-1195, and *Al Odah* v. *United States*, No. 06-1196, and then disposed of as appropriate in light of those decisions.

Respectfully submitted.

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62

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TABLE OF CONTENTS

Page

I. ARGUMENT 1

II. CONCLUSION 10

Appendix A (Petition of the United States for Certiorari Before Judgment in No. 04-105, *United States v. Fanfan*). 1a

Appendix B (Petition for Certiorari Before Judgment in No. 02-516, *Gratz v. Bollinger*)..... 6a

TABLE OF AUTHORITIES

Page

CASES

Abney v. United States, 431 U.S. 651 (1977) 8
Al Odah v. United States, 476 F.3d 981 (D.C. Cir. 2007) ..... passim
Bismullah v. Gates, No. 06-1197 (D.C. Cir. July 20, 2007) ... 4-5
Bolling v. Sharpe, 344 U.S. 873 (1952) 3
Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007) ..... passim
Coolidge v. New Hampshire, 403 U.S. 443 (1971) 7
Cummings v. Missouri, 71 U.S. 277 (1867) 8
Ex parte Quirin, 317 U.S. 1 (1942) 10
Ex parte Royall, 117 U.S. 241 (1886) 4
Gilliam v. Foster, 75 F.3d 881 (4th Cir. 1996) 8
Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) ..... passim
Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 6
In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) 6
In re Yamashita, 327 U.S. 1 (1946) 10
Mathews v. Diaz, 426 U.S. 67 (1976) 7, 8
O'Neal v. McAninch, 513 U.S. 432 (1995) 9
Parhat v. Gates, No. 06-1397 (D.C. Cir. July 20, 2007) 4-5
Pierce v. Carskadon, 83 U.S. 234 (1872) 8
Plaut v. Spendthrift Farms, 514 U.S. 211 (1995) 7
Porter v. Dicken, 328 U.S. 252 (1946) 3
Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989) 9
Rasul v. Bush, 542 U.S. 466 (2004) 9
Taylor v. McElroy, 358 U.S. 918 (1958) 3
United States v. Burr, 25 F. Cas. 2 (1807) 4
United States v. Klein, 80 U.S. 128 (1871) 7
United States v. Villato, 28 F. Cas. 377 (1797) 4

STATUTES

28 U.S.C. § 2101(e) 2
Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 ..... 2, 4
Habeas Corpus Act of 1679, 31 Car. 2 4

TABLE OF AUTHORITIES
(continued)

Page

Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 ..... passim

REGULATIONS AND RULES

S. Ct. R. 11 ..... 1, 2
S. Ct. R. 44.4 2

OTHER AUTHORITIES

Dep't of Def., News Releases (Dec. 3, 2003; Dec. 18, 2003; Dec. 30, 2003; Feb. 6, 2004; Feb. 24, 2004; Mar. 3, 2004; May 18, 2004; June 10, 2004) 9
Dep't of Def., Military Commission Charges Referred (June 29, 2004) 9
Editorial, *A Plea Tainted by Guantanamo*, Canberra Times, Mar. 29, 2007 10
Editorial, *Guantanamo Follies*, N.Y. Times, Apr. 6, 2007 10
Editorial, *Spectacle at Guantanamo*, Wash. Post, Apr. 4, 2007 10
Petition for Writ of Certiorari Before Judgment, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) 3
Petition for Writ of Certiorari Before Judgment, *United States v. Fanfan*, 543 U.S. 220 (2005) (No. 04-105) 3
Petition for Writ of Certiorari, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491) 3
Petition for Writ of Certiorari, *INS v. Orlando Ventura*, 537 U.S. 12 (2002) (No. 02-29) 3
Press Release, Dep't of Def., Key Military Commission Officials Announced (Apr. 20, 2004) 9
Reply Brief for Petitioner on Writ of Certiorari, *Ashcroft v. Seneca-Cayuga Tribe*, 540 U.S. 1218 (2004) (No. 03-740) 3
The Federalist No. 83 (Hamilton) 9
Thom Shanker and David E. Sanger, *New to Pentagon, Gates Argued for Closing Guantanamo Prison*, N.Y. Times, Mar. 23, 2007 10

TABLE OF AUTHORITIES
(continued)

Page

Tim Golden, *Administration Officials Split Over Stalled Military Tribunals*, N.Y. Times, Oct. 25, 2004 9
Tr. Oral Arg., *Hamdan v. Rumsfeld*, D.C. Cir., No. 04-5393 (2005).....5

ARGUMENT

Salim Hamdan's petition explains why his habeas challenge to the jurisdiction of a new military commission under the Military Commissions Act ("MCA"), Pub. L. No. 109-366, § 7(b), 120 Stat. 2600, presents questions "of such imperative public importance as to justify deviation from normal appellate practice," S. Ct. R. 11, and is the necessary and proper companion to cases already before this Court. Rather than deal with these arguments, Respondents devote much of their opposition to mischaracterizing Petitioner's challenge as one to his "det[ention] as an enemy combatant." Br. Opp. 11-12. Relying on this mischaracterization, Respondents then assert that the issues raised by Hamdan are merely duplicative of those raised by *Boumediene v. Bush*, No. 06-1195, and *Al Odah v. United States*, No. 06-1196 ("*Boumediene*") and that this case should be left to the D.C. Circuit to resolve.[1]

But Respondents offer no convincing reason why this case, which this Court has already heard once in establishing a precedent relevant to the cases now before this Court, should be denied review. Nothing in the rules or case law prohibits a second petition for certiorari before judgment.[2] This Court's grant of certiorari in *Boumediene* is a significant intervening development. And this case will not alter this Court's timetable for hearing *Boumediene*, since Petitioner has proposed a briefing and argument schedule that mirrors *Boumediene*.

No purpose is served by yet more delay. The Solicitor General acknowledges as much by arguing that *Boumediene* "might well resolve the additional constitutional claims asserted by petitioner." Br. Opp. 14. If so, there is little downside, and significant potential upside, to having a concrete case before this Court to help resolve those issues. Review is particularly appropriate since Hamdan's case not only presents the distinct

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[1] It is unclear what Respondents believe is left for the D.C. Circuit to resolve in Hamdan's case. If it raises issues merely duplicative of those presented by *Boumediene*, as Respondents assert, then the D.C. Circuit's decision in those cases is fully determinative of Hamdan's case as well.

[2] Of course, even were certiorari before judgment and rehearing both inappropriate, the Court could simply treat this as a Petition for an Extraordinary Writ, as the Petition itself noted. Pet. 1 & n.1. Respondents' brief in opposition does not challenge this mechanism, which is entirely available.

question whether habeas is available to challenge the MCA *commission* process, but also raises on behalf of all detainees objections to the MCA that are narrower in scope than the Suspension Clause challenge in *Boumediene*.

Critically, if this Court were to rule against the *Boumediene* detainees by finding that Congress' CSRT review provisions adequately substitute for habeas, that decision would leave unanswered Hamdan's argument that habeas is available to allow challenges to the separate commission process. *Compare* MCA § 7(a) (attempting to strip habeas for enemy combatants) *and* Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680, § 1005(e)(2) (providing for limited review of detention decisions) *with* MCA § 3 (attempting to strip habeas for commission challenges and providing circumscribed review). Alternatively, if this Court were to hold that the *Boumediene* detainees are protected by the constitutional right of habeas because the CSRT review provisions offer an inadequate substitute, the Court's ruling would not resolve whether Hamdan is similarly protected. No inquiry into the adequacy of MCA § 3 review can take place in *Boumediene* without this case.

1. Respondents argue that this is a successive petition that should be rejected on that basis alone. Br. Opp. 9. The argument lacks a basis in the rules or decisions of this Court, and Respondents tellingly cite to no authority. In fact, a plain reading of the rules compels the opposite conclusion. Rule 11 contains no prohibition on consecutive petitions, and its governing statute provides that petitions may be filed "at *any* time before judgment." 28 U.S.C. § 2101(e) (emphasis added). Rule 11 stands in marked contrast with rules such as Rule 44.4, governing petitions for rehearing, which explicitly prohibits "consecutive petitions."[3]

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[3] There is no merit in Respondents' suggestion that allowing this successive petition would somehow make it easier to obtain review before judgment than by the ordinary course of review after judgment. Br. Opp. 9. However many petitions are filed, the heightened standard remains in place: whether they present issues "of such imperative public importance as to justify deviation from normal appellate practice." S. Ct. R. 11. In allowing successive petitions, Rule 11 recognizes the obvious fact that circumstances can change before judgment, possibly justifying certiorari at multiple points in time, in a way they cannot change after judgment. Further, if this case meets the standard for certiorari before judgment, by definition it justifies departure from "normal appellate

Furthermore, the Clerk's Office was required to review this Petition, and if the Clerk believed it improper, it would have been rejected. Finally, the obvious change in circumstance warranting a further Petition is that this Court has taken the extremely unusual steps to grant rehearing in *Boumediene* and to set oral argument.

2. Respondents' principal claim, that this case is duplicative, Br. Opp. 10-12, is in serious tension with what they say next: that this case raises novel issues not appropriate for review at this time, Br. Opp. 13-16. It is also in tension with the Solicitor General's filings in past cases.[4] In fact, this case presents a crucial counterpart to *Boumediene* without which this Court's inquiry into the MCA's attempted habeas stripping will be incomplete.[5]

a. To reach the conclusion that these cases present duplicative questions, Respondents disregard that Hamdan challenges his commission. Pet. 9-10. While the *Boumediene* petitioners argue that their right to challenge their detention and the related CSRT process is protected both by statutes and by the Constitution,

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practice," including Respondents' asserted policy against successive petitions.

[4] The Government has, in fact, regularly sought certiorari before judgment in order to bring closely related cases raising similar issues before this Court. For example, it sought certiorari in both No. 04-104, *U.S. v. Booker*, and No. 04-105, *U.S. v. Fanfan*. Far from suggesting that "duplicative" review was inappropriate, the Government asserted that this duplication highlighted the need for certiorari before judgment. U.S. Cert. Pet. Before Judgment, *Fanfan*, 543 U.S. 220 (2005), at 7-8 ("*The government's petition for certiorari in* Booker *presents the same questions that are presented here*... In this case, unlike *Booker*, the court of appeals has not yet reviewed the judgment." (emphasis added)). Indeed, the Government cited the very cases Mr. Hamdan relies upon here. *Id.* at 9 ("In addition to *Gratz*, the Court has granted certiorari before judgment in other cases where cases presenting similar issues had already been accepted for review. *See, e.g., Taylor v. McElroy*, 358 U.S. 918 (1958); *Bolling v. Sharpe*, 344 U.S. 873 (1952); *Porter v. Dicken*, 328 U.S. 252, 254 (1946)."). *See also* U.S. Cert. Pet. Reply, *Ashcroft v. Seneca-Cayuga Tribe*, 540 U.S. 1218 (2004) (No. 03-740), at 10 (seeking certiorari because "if the certiorari petition is granted in *Santee Sioux* [No. 03-740], essentially the same question will already be before the Court."); U.S. Cert. Pet., *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491), at 19 ("review is warranted in both *Radoncic* [No. 01-1459] and this case, to better ensure a definitive resolution.... in a wider range of applications"); U.S. Cert. Pet., *INS v. Orlando Ventura*, 537 U.S. 12 (2002) (No. 02-29), at 10 (seeking grant in case with "the same legal issue" as No. 02-25, *INS v. Chen*).

[5] This Court has accepted such claims from private litigants. *E.g.*, Pet. Cert. Before Judgment, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), at 15.

Hamdan presents the other half of that question: whether statutes and the Constitution protect those facing commission trial.[6] Together these cases occupy the field of challenges that may be brought to the MCA's habeas-stripping provisions, and to cover that field this Court should consider the cases together.

b. Respondents' assertion that this case presents the same issue as *Boumediene* because the MCA "makes no distinction between aliens detained as enemy combatants and those who are also subject to trial by military commission" also falls flat. Br. Opp. 11. The relevant distinction is not the identity of the respective petitioners but the nature of the government action each challenges. MCA § 7(a) does not distinguish between commission and detention challenges, but other provisions do. DTA § 1005(e)(2) provides for exclusive and limited judicial review of final CSRT determinations of the propriety of detention in the D.C. Circuit. By contrast, MCA § 3 provides for limited review of final determinations of commissions. While the two provisions both provide for strictly circumscribed review in the D.C. Circuit, they are not identical;[7] each presents distinct and complicated questions as to the scope and nature of the attendant review—a natural conclusion given the recognized differences between administrative detention and criminal prosecution.[8]

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[6] At the Founding, a touchstone of habeas was the right to contest an illegal trial before the trial took place. *E.g.*, *United States v. Villato*, 28 F. Cas. 377 (C.C. D. Pa. 1797) (granting habeas to alien charged with high treason for helping capture an American ship); *United States v. Burr*, 25 F. Cas. 2 (C.C. D. Va. 1807) (describing how Burr's compatriots were charged with treason and released on habeas before trial); *cf. Ex parte Royall*, 117 U.S. 241, 248 (1886) (interpreting habeas statute to allow courts to review the constitutionality of statutes pre-trial). The 1679 Habeas Corpus Act itself granted relief for those accused of "high treason or felony." *See* Habeas Corpus Act of 1679, 31 Car. 2, c. 2, § 7.

[7] For example, DTA § 1005(e)(2) requires the D.C. Circuit to inquire into whether CSRT determinations are consistent with the Secretary of Defense's regulations. MCA § 3, in contrast, mandates that the D.C. Circuit ensure that commission determinations are consistent with the MCA itself.

[8] This is also demonstrated by the D.C. Circuit's recent decisions in *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. July 20, 2007), and *Parhat v. Gates*, No. 06-1397 (D.C. Cir. July 20, 2007). Those cases set the standard for DTA § 1005(e)(2) review of CSRTs, rejecting the narrow approach urged by the Government and making plain that review of CSRT determinations under the DTA will proceed very differently from review of commission decisions under the MCA.

c. Finally, Respondents disagree that certiorari is necessary here because, in its absence, the Government could evade a defeat in *Boumediene* by simply charging detainees before commissions. Br. Opp. 11. They assert that there is no reason to think that, in the wake of a holding in *Boumediene* that habeas is available to challenge detention at Guantanamo, such relief will not also be available to detainees (including Hamdan) slated for trials.

This misses the point. Even if detainees facing commissions may file habeas petitions challenging their detention in the future,[9] the government will almost certainly argue at that point that such a petition may not challenge *commissions*. And that argument could prove correct inasmuch as such challenges are not before this Court in *Boumediene*. Indeed, leaving aside the *Government*'s claim, the petitioners themselves in *Boumediene* have suggested repeatedly that those facing commissions may lack access to the Great Writ. *See* Pet. 11-12 (detailing examples). That substantial point of conflict between Hamdan and the *Boumediene* petitioners itself provides a significant reason to grant review.[10]

This is a point which seems wholly to escape Respondents, who assert that Hamdan's challenge to MCA § 3 will be dealt with in *Boumediene* simply because Hamdan used the phrase "[j]ust as with the *Boumediene* and *Al Odah* challenges." Br. Opp. 13 n.4. But, of course, the fact that DTA § 1005(e)(2) and MCA § 3 are inadequate substitutes does not imply that both are insufficient for the same reasons. Further, *Boumediene* cannot decide the sufficiency of MCA § 3 for the obvious reason that those petitioners are not challenging commissions.

While *Bismullah* and *Parhat* helpfully illustrate whether Congress has provided an adequate substitute for habeas with respect to CSRTs, a similar circuit court decision on MCA § 3 is wholly unnecessary. As argued fully in Hamdan's Petition, MCA § 3 is an inadequate substitute *on its face* because it delays review until a final commission decision, allows the Executive to avoid review altogether, does not allow independent judicial inquiry into conditions of confinement, seemingly precludes courts from considering treaty claims, and precludes review of the sufficiency of evidence. Pet. 21-23. These defects are all manifest in the statute as written; waiting additional months or years will not clarify them. This Court recognized as much when it rejected Respondents' claim that the DTA required post-trial review. *Hamdan*, 126 S. Ct. at 2770-72.

[9] Respondents have already sought to dismiss Hamdan's *entire case*, including his (unbriefed) challenge to his non-commission detention, due to the pendency of commission charges. *E.g.*, Tr. Oral Arg., *Hamdan v. Rumsfeld*, D.C. Cir. No. 04-5393, at 5 (argument of Asst. Atty. Gen. Keisler) ("we believe the proper course was for the District Court to dismiss the case on the basis of abstention").

[10] Moreover, detention and criminal trials are fundamentally different creatures

The Government could thus evade the spirit of habeas by reclassifying detainees as commission defendants (a step it has already admitted it plans on doing with 80 current detainees) and further delay resolution of the ultimate question of whether those defendants retain habeas to challenge the full range of government action against them. By hearing this case, this Court can fully determine the rights of detainees regardless of the Government's shifting classifications and guarantee speedy resolution of any resulting habeas petitions in accordance with law.[11]

3. Respondents also assert that Petitioner's constitutional challenges to the MCA are "secondary" and can be decided in *Boumediene*. Br. Opp. 13. Nothing could be further from the truth. The *Boumediene* petitioners do not raise separation of powers, bill of attainder, or equal protection challenges to the MCA. *See* Pet., *Boumediene* at i (questions presented); Pet., *Al Odah* at i (same).[12]

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and there is no reason why this Court's holdings on one should apply with equal force to the other. This Court has repeatedly recognized the differences between detention and military trial. *Hamdan*, 126 S. Ct. at 2798 ("Hamdan does not challenge, and we do not today address, the Government's power to detain him"); *id.* at 2817 (Scalia, J., dissenting) ("The vast majority of pending petitions, no doubt, do not relate to military commissions at all, but to more commonly challenged aspects of 'detention'"); *Boumediene*, 476 F.3d at 1005 & n.9 (Rogers, J., dissenting); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005), *rev'd by Boumediene*, 476 F.3d 981; *see also Hamdi v Rumsfeld*, 542 U.S. 507, 593 (2004) (Thomas, J., dissenting) (drawing a "punishment-nonpunishment distinction"); Amicus Br. of Military Attorneys Assigned to the Office of Military Commissions, *Al Odah*, No. 03-343, at 5-7.

[11] Respondents also assert that there is no reason to hold this petition pending *Boumediene*. At a minimum, a hold would be the ordinary course, even without a showing of irreparable harm. Moreover, unless this Court affirms the D.C. Circuit's *Boumediene* holding that the Constitution does not apply at Guantanamo, no lower court will be able simply to apply this Court's decision in *Boumediene* to Hamdan's case. By reviewing this concrete case, this Court can provide clear guidance about how its holdings bear on commission challenges.

[12] Respondents assert that this case would be a poor vehicle because those challenges have not been fully adjudicated below. Of course, the vast majority of these claims have been briefed once, on the merits, in No. 05-184, and each was raised below. Pet. App. 15a-16a n.16. Further, this contention is disingenuous because the Government simultaneously contends in the proceedings below that *Boumediene* is binding precedent so that those in Hamdan's position possess *no* constitutional rights. Additionally, these claims present pure questions of law perfectly suited for determination by this Court. Respondents even argue, albeit incorrectly, that this Court *will* resolve them in *Boumediene*. Br. Opp. 13-14.

Petitioner contends that, in stripping jurisdiction and directing that no Geneva Convention rights can be invoked by commission defendants, the MCA violates separation of powers by preventing implementation of this Court's ruling in *Hamdan* that "there is at least one provision of the Geneva Conventions that applies here"—Common Article 3. 126 S. Ct. at 2794. Respondents ignore this legislative encroachment upon the judicial function (whereby the MCA dictates a "rule of decision" for pending cases, violating principles in *United States v. Klein*, 80 U.S. 128 (1871), and *Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995)). Instead, Respondents misleadingly parse *Hamdan* to suggest that this Court denied enforcement of treaty rights. Br. Opp. 14. That gloss not only misstates *Hamdan*'s holding (which, after all, struck down his commission "because its structure and procedures violate both the UCMJ and the Geneva Conventions," 126 S. Ct. at 2759), it also completely sidesteps the separation of powers problem with the MCA, i.e., that "Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was." *Plaut*, 514 U.S. at 227.

Respondents' equal protection argument is similarly weak. They argue that the MCA does not impinge on a fundamental right because the statute provides an "adequate" substitute. Br. Opp. 15. Respondents are incorrect. *See* Pet. 21-23 (setting forth the myriad reasons why MCA § 3 is not an adequate substitute). Further, habeas is "the very essence of constitutional liberty." *Coolidge v. New Hampshire*, 403 U.S. 443, 454 n.4 (1971). Respondents' claim that federal alienage classifications only warrant rational basis review is also misguided. *Mathews v. Diaz*, 426 U.S. 67 (1976), the sole case they cite, applied such review only for doling out scarce government benefits. *Id.* at 78-79. *Mathews* made clear that the Fifth Amendment protects aliens "from deprivation of life,

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Tellingly, Respondents' opposition omits the facts that two months ago they asked the D.C. Circuit to summarily affirm the district court and also opposed initial en banc in this case – hardly actions by litigants who extol the virtues of percolation. Br. Opp. 15. Respondents' newfound respect for percolation is simply inconsistent with the fact that they have sought to preclude it at every juncture. Now, after six years and after this case has already been decided once by this Court, this Court should hear this case – and should do so before the next round of trials takes place. The eyes of the world will be watching those trials, and the impression the trials leave cannot be erased.

liberty, or property without due process" even when the alien's presence is "unlawful, involuntary, or transitory." *Id.* at 77.[13]

4. Respondents contend that "petitioner does not even allege ...irreparable harm." Br. Opp. 12. This is not the relevant standard (as is plain from the other cases where certiorari before judgment has been granted) and is flatly incorrect. *See* Pet. 8, 21-22; Mo. Expedite 14-15 & n.8. In fact, Respondents fail to address those allegations, no doubt because they cannot credibly deny them.

As this Court has recognized, "Hamdan and the Government both have a compelling interest in knowing *in advance* whether Hamdan may be tried by a military commission that arguably is without any basis in law."[14] Hamdan's interest is in not being tried by a commission that lacks jurisdiction over him personally and over the alleged offenses preferred against him on an ex post facto basis.[15] The situation is directly analogous to the protection against Double Jeopardy: "the constitutional protection...would be irreparably lost if Petitioners were forced to endure the second trial before seeking to vindicate their constitutional rights." *Gilliam v. Foster*, 75 F.3d 881, 904 (4th Cir. 1996) (en banc) (citing *Abney v. United States*, 431 U.S. 651, 660 (1977)). A commission trial will irreversibly preview Hamdan's defense and trial strategy, a compelled disclosure that unquestionably

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[13] Respondents claim that the MCA is not an Attainder because it does not apply to easily ascertainable individuals. Br. Opp. 14. But they elsewhere admit that the MCA applies to precisely such an easily ascertainable group–specifically those "aliens determined by administrative processes to be enemy combatants or who are being held as enemy combatants while awaiting such determinations." *Id.* The open-ended nature of the MCA does not save it. *See Cummings v. Missouri*, 71 U.S. 277 (1867) (striking down a state constitutional provision barring anyone who failed to take an oath from certain forms of employment); *id.* at 323-24 (recounting an open-ended British attainder aimed at "comforters, abettors, partakers, confederates, or adherents unto the" Earl of Kildare). Likewise, Respondents' claim that the MCA does not work punishment conflicts with this Court's recognition that complete deprivation of access to the courts is "punishment." *See Pierce v. Carskadon*, 83 U.S. 234, 237-39 (1872).

[14] *Hamdan*, 126 S. Ct. at 2772 (emphasis added). If this Court ultimately decides that the position it rejected last year, abstention, is now appropriate, it can make such a decision after full briefing and argument. Since over three years have elapsed from Hamdan's indictment with no trial, the case for abstention is weak.

[15] Indeed, a plurality of this Court has held that one of those charges, conspiracy, is not a violation of the law of war. *Hamdan*, 126 S. Ct. at 2785.

"prejudice[s] the position of [P]etitioner[]." *Boumediene*, 549 U.S. –, slip. op. at 2 (statement of Stevens, J., and Kennedy, J.).[16]

Finally, Petitioner will be irreparably harmed by having to defend himself in a trial in which no one—neither judge, nor prosecution, nor defense—knows whether the Constitution governs the proceedings, constrains the prosecution, or protects the defendant in any way. Pet. 8 n.5. Petitioner is unable to develop a defense strategy under such uncertainty. These rights will be impossible for courts to vindicate fully ex post.[17]

The Great Writ's longstanding function has been to avoid such perils by allowing pretrial challenges to the jurisdiction of special criminal courts, particularly military tribunals. Habeas was "provided for in the most ample manner" in the Constitution as a bulwark against "arbitrary methods of *prosecuting* pretended offenses." *The Federalist* No. 83 (Hamilton) (emphasis added).[18]

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[16] *See Rafeedie v INS*, 880 F.2d 506, 517 (D.C. Cir. 1989) ("irreparable injury" results if litigant forced to put on defense in a proceeding he believes unlawful).

[17] The Government's brief is notable for what it does *not* say. It does not say that the Government will suspend Hamdan's commission—or trials for any of the 80 expected defendants—while this Court considers *Boumediene*. In fact, after this Court granted certiorari in *Rasul* in 2003, the Government accelerated commission proceedings. The "decision by the Supreme Court to hear a case challenging the detentions at Guantanamo prompted yet another push by the Pentagon to get the commissions going." Tim Golden, *Administration Officials Split Over Stalled Military Tribunals*, N.Y. Times, Oct. 25, 2004, at A1. Over the eight months preceding the Court's decision in *Rasul*, the Government assigned defense counsel to detainees, designated the appellate panel, issued new commission orders, and charged three detainees—none of which it had done in the preceding years. *See* Dep't of Def., News Release, http://www.defenselink.mil/releases/archive.aspx (Dec. 3, 2003; Dec. 18, 2003; Dec. 30, 2003; Feb. 6, 2004; Feb. 24, 2004; Mar. 3, 2004; May 18, 2004; June 10, 2004). On the day that *Rasul* was argued before this Court, the Government simultaneously issued a set of revised commission instructions and announced "key military commission officials." Press Release, Dep't of Def., Key Military Commission Officials Announced (Apr. 20, 2004), http://www.defenselink.mil/releases/release.aspx?releaseid=7278. And the day after *Rasul* was decided, the Government referred charges for detainees Al Bahlul, Al Qosi, and Hicks to commissions. Dep't of Def., Military Commission Charges Referred (June 29, 2004), http://www.defenselink.mil/releases/release.aspx?releaseid=7504.

[18] This Court has repeatedly held that a "basic purpos[e] underlying the writ of habeas corpus" is to "hel[p] guarantee the integrity of the criminal process by assuring that trials are fundamentally fair." *O'Neal v McAninch*, 513 U.S. 432, 442 (1995). Furthermore, "inquiry into the authority of the commission...may be

The Government also has a compelling interest in obtaining this Court's guidance on whether commissions are proceeding lawfully. Indeed, had this Court accepted Respondents' wait-and-see arguments under the abstention doctrine in No. 05-184, there may well have been scores of commission convictions that would have been overturned by this Court's ultimate ruling in *Hamdan v. Rumsfeld*. A grant of certiorari in this case could avoid such a fiasco in the future. Moreover, a vital national interest—our reputation as a people committed to equal justice under law and to fulfillment of our obligations under treaties—is at stake.[19] The recent plea of David Hicks has furthered such doubts.[20] Both the Secretary of Defense and Secretary of State have expressed opposition to commission trials at Guantanamo.[21] In light of these profound doubts, we would do well to recall the warning of Justice Rutledge: "It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late." *Yamashita*, 327 U.S. at 41-42 (Rutledge, J., dissenting).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari Before Judgment should be granted.

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made by habeas" on a pretrial basis. *In re Yamashita*, 327 U.S. 1, 8-9 (1946); *Ex parte Quirin*, 317 U.S. 1, 25 (1942). In *Quirin*, "in view of the public importance of the questions raised by th[e] petitions," this Court granted certiorari before judgment in an interlocutory commission challenge. 317 U.S. at 19-20.

[19] Much international condemnation surrounds the MCA military commission provisions. Many believe that the provisions violate this Court's Common Article 3 holding in *Hamdan* and other treaties. *E.g.*, Amicus Br. of 411 U.K. and E.U. Parliamentarians in Support of Petitioner, No. 07-15, at 13-15.

[20] Editorial, *Guantanamo Follies*, N.Y. Times, Apr. 6, 2007 at A18 (criticizing plea as "emblematic" of the "lawless nature" of Guantanamo); Editorial, *Spectacle at Guantanamo*, Wash. Post, Apr. 4, 2007 (plea shows commissions "politically twisted in a way that would be inconceivable in a credible court of law"); Editorial, *A Plea Tainted by Guantanamo*, Canberra Times, Mar. 29, 2007 (commission "highlights the willingness of the US Government . . . to sidestep the rule of law [and] ignore accepted conventions of human rights").

[21] Thom Shanker and David E. Sanger, *New to Pentagon, Gates Argued for Closing Guantanamo Prison*, N.Y. Times, Mar. 23, 2007 at A1.

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July 24, 2007

REPLY APPENDIX A

No. 04-105

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

v.

DUNCAN FANFAN, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: Whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

. . .

The government is today filing petitions for certiorari in this case and in *Booker*, *supra*, as companion vehicles for this Court's consideration of the implications of *Blakely* for federal sentencing. Further review is warranted in both cases, on an expedited basis, in order to provide authoritative answers to the questions presented and to provide guidance on how to conduct the thousands of federal criminal sentencings that are scheduled each month.

A. Review Of The Implications Of *Blakely* For Federal Criminal Justice Is Warranted

The government's petition for certiorari in *Booker* recounts in detail the conflict in the circuits that has arisen on whether *Blakely* applies to the Guidelines. Booker Pet. 11-14. It also explains the importance of the second question presented in both cases: i.e., the issue of how, if the rule in *Blakely* applies to the federal Sentencing Guidelines, sentencing is to be conducted in federal cases in which *Blakely*'s interpretation of the Sixth Amendment invalidates application of certain Guidelines provisions. Booker Pet. 14-19....

B. This Case Squarely Presents The Issues Surrounding The *Blakely* Controversy On Which This Court's Guidance Is Needed

This case squarely raises both of the issues presented. The district court determined that *Blakely* applies to the Guidelines. It then imposed sentence based on its conclusion that the Guidelines as a whole could continue to govern federal sentencing, although in a truncated fashion and not in their intended manner. App., *infra*, 1a-13a. The court thus refused to apply Guidelines enhancements for drug quantity and respondent's role in the offense because, the court held, to do so "would unconstitutionally impinge upon [respondent's] Sixth Amendment right to a jury trial as explained by *Blakely*." *Id.* at 11a. On that basis, the court sentenced respondent to 78 months of imprisonment (from a 63-78 month sentencing range), rather than sentencing respondent within the 188-235 months range that it concluded the Guidelines would otherwise require. Id. at 7a. The case thus squarely presents both the question whether federal sentencing practice is unconstitutional under *Blakely* and, if so, how sentencing should be conducted.

C. Certiorari Should Be Granted Both Here And In *United States v. Booker*

In *Booker*, *supra*, the Seventh Circuit held that *Blakely* applies to the Guidelines and precludes their normal operation in cases in which judicial factfinding would increase the defendant's maximum sentence under the Guidelines. Booker Pet. App. 8a-9a. The court then remanded the question of severability and other remedial issues to the district court. Id. at 13a. The government's petition for certiorari in *Booker* presents the same questions that are presented here. Because the petition in *Booker* seeks review of a decision of a court of appeals, it offers the opportunity for review of the issues through the Court's customary certiorari procedure.

In this case, unlike *Booker*, the court of appeals has not yet reviewed the judgment. But this case has the advantage of arising from a decision in which the sentencing court resolved

both questions presented in the petition. This case thus provides an appropriate companion to *Booker* for this Court to consider, in a concrete context, the implications of *Blakely* for federal sentencing.

Simultaneous grants of review here and in *Booker* are warranted. Granting certiorari in both cases would protect against any possibility that later impediments to review in one or the other case might prevent timely resolution of the issues. Assurance that the Court will have a vehicle in which to reach and resolve the important issues presented, and thereby reduce or eliminate the uncertainty that is currently ravaging the federal sentencing system, is warranted in light of what one court has called "an impending crisis in the administration of criminal justice in the federal courts." *United States* v. *Penaranda*, 2004 WL 1551369, at *7 (2d Cir. July 12, 2004) (en banc), certification docketed, No. 04-59 (July 13, 2004).

D. A Grant Of Certiorari Before Judgment And Expedited Consideration Is Warranted In The Exceptional Circumstances Of This Case

1. A petition for a writ of certiorari before judgment in a case pending in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11. This case satisfies that strict criterion.

On several occasions, this Court has granted certiorari before judgment when necessary to obtain expeditious resolution of exceptionally important legal questions. Most notably, the Court granted certiorari before judgment in Mistretta v. United States, 488 U.S. 361, 396 (1989), in which, as in this case, the constitutionality of the federal sentencing scheme was at issue. The Court also granted certiorari before judgment in *Gratz v. Bollinger*, 539 U.S. 244, 259-260 (2001); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (Iran hostage agreement); *United States v. Nixon*, 418 U.S. 683 (1974) (subpoena to the President); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (steel seizure case); and *Ex parte*

Quirin, 317 U.S. 1 (1942) (President's assignment to a military tribunal of jurisdiction over the trial of belligerent saboteurs).

[footnote] See *Barefoot* v. *Estelle*, 463 U.S. 880 (1982) (certiorari before judgment to decide standards governing stay of execution pending litigation of habeas petition); *Clark* v. *Roemer*, 501 U.S. 1246 (1991) (granting certiorari before judgment and summarily vacating and remanding case for further consideration in light of intervening Supreme Court decision). In addition to Gratz, the Court has granted certiorari before judgment in other cases where cases presenting similar issues had already been accepted for review. *See, e.g.*, *Taylor* v. *McElroy*, 358 U.S. 918 (1958); *Boiling* v. *Sharpe*, 344 U.S. 873 (1952); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946).

See generally James Lindgren & William R. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259. The constitutionality of federal sentencing practice in light of *Blakely* concerns a subject of equal national importance and warrants certiorari before judgment in this case....

REPLY APPENDIX B

No. 02-516

IN THE SUPREME COURT OF THE UNITED STATES

JENNIFER GRATZ AND PATRICK HAMACHER, PETITIONERS

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

2. Did the district court correctly dismiss the plaintiff class's claim for injunctive relief with respect to the University of Michigan's use of racial preferences in undergraduate admissions?

3. Did the individual defendants violate the clearly established legal rights of plaintiffs, so that they are not entitled to summary judgment on the ground of qualified immunity?

. . . .

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD EXERCISE ITS POWER TO GRANT REVIEW BEFORE JUDGMENT

Rule 11 of this Court's rules provide that a writ of certiorari before judgment in a case pending in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." For several reasons, the circumstances of this case make it appropriate for granting such early review.

First, the case presents issues of fundamental national importance. *See* discussion *infra* at 24-30. It concerns important constitutional and civil rights, and the resolution of these issues will almost certainly have effects that extend far beyond the parties to the case.

Second, this Court has before it a petition for certiorari filed on August 9, 2002, in *Grutter v. Bollinger*, which seeks review of a decision by the same court of appeals in which this case is pending, which involves many of the same parties, and which presents issues that are in many respects identical or very similar to those raised in this case.

[footnote] The Board of Regents of the University of Michigan and Lee Bollinger, formerly president of the University and prior to that dean of its law school, are defendants in both the *Grate* [sic] and *Grutter* cases.

There are, however, also differences between the two cases. Among other things, a comparison of the cases shows how racial preferences can take different forms, while inflicting the same kinds of harm. While each case itself is separately worthy of this Court's review, the two cases considered together will present the Court with a broader spectrum and more substantial record within which to consider and rule upon the common principles that they involve than if only one case is considered, or if they are resolved separately and at different times or in different terms. In a number of cases, this Court has found it appropriate to grant review before judgment when another similar case has already been accepted for review by the Court. For example, in considering a petition for certiorari in *Brown v. Board of Education*, 344 U.S. 1, 3 (1952), the Court took judicial notice of a similar case pending in the court of appeals and invited the filing of a petition for review in that case, *id.* at 3, which was subsequently granted, see *Boiling v. Sharpe*, 344 U.S. 873 (1952). See also *Taylor v. McElroy*, 358 U.S. 918 (1958) (certiorari granted before judgment "because of the pendency here" of another case, *Greene v. McElroy*, 360 U.S. 474 (1959), which involved the same important constitutional issues and which was pending in the same court

of appeals); *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (certiorari granted before judgment "by reason of the close relationship of the important question raised to the question presented" in a case for which the Court had already granted certiorari, *Porter v. Lee*, 328 U.S. 246 (1946)).

Third, the absence of a decision from the Sixth Circuit in this case should make no difference on the common principal issues related to compelling-interest and narrow-tailoring analyses raised by the two cases. The Sixth Circuit decided the first issue as a matter of law in *Grutter v. Bellinger*, 288 F.3d at 738-44 (holding diversity to be a compelling interest). Presumably, in eventually deciding this case, the Sixth Circuit would follow its own recent precedent as to those issues. Accordingly, this Court already has for evaluation the reasoning of the Sixth Circuit on compelling-interest analysis. As to narrow-tailoring, the Sixth Circuit has also already laid out its analytical approach to the issue. *Id.* at 744-52.

The sharp division in the lower courts (*see* discussion *infra* at 20-24) has itself created circumstances whereby the various competing arguments on compelling interest and narrow tailoring have been fully developed. These considerations, plus the circumstance that the district court decided the case on summary judgment, subjecting it to de novo review by this Court and the Sixth Circuit, militate against waiting for a decision from the Sixth Circuit. This is particularly true given the benefits of having the cases considered together.

Fourth, the effect on members of the class caused by the Sixth Circuit's delay is also a consideration that weighs in favor of granting review at this time. Because the University starts making admissions decisions in the fall for the class to be enrolled in the following fall, inaction by the Sixth Circuit has already meant that many members of the class now applying for admission will compete for scarce admissions spots under a race-based dual system. Although it is unknown when the Sixth Circuit would eventually render a decision in this case, the delay that has already occurred - nearly ten months since the case was argued and over nineteen months since the appeal was filed - is incompatible with the time-sensitive nature of the

admissions process (and with the Sixth Circuit's ruling (*see* discussion *supra* at 13 & n.2) that the appeal would be expedited). See *Aaron v. Cooper*, 357 U.S. 566, 567 (1958) (denying petition for review before judgment in school admissions case where belief expressed that court of appeals would "recognize the vital importance of the time element in this litigation" and would act "in ample time to permit arrangements to be made for the next school year"). *Cf. United States v. Clinton*, 524 U.S. 912 (1998) (denying petition for review before judgment while noting that "[i]t is assumed the Court of Appeals will proceed expeditiously to decide this case").

Finally, granting review at this time will not deny the Court the time to reflect adequately on the important issues at stake. The petition has been filed in time to permit, if it is granted, briefing on the merits in the normal course and consideration by this Court during the 2002 term. Moreover, if the Court grants review in *Grutter v. Bollinger*, the two cases could, at the Court's direction, be briefed on the merits under a simultaneous schedule, argued on the same day, and decided during the same term.

Although this Court rarely exercises its power to grant review before judgment, this is one of the rare cases where the Court should grant the petition before judgment.

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No. 07-15

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

ROBERT M. GATES, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

AMICUS CURIAE BRIEF OF 411 UNITED KINGDOM AND EUROPEAN PARLIAMENTARIANS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 5

I. The Interests Of All Parties And The Wider World Are Served By An Expeditious And Definitive Resolution Of The Important Questions Presented In This Case 5

II. Granting The Petition Is Necessary To Prevent Violations Of International Law 8

A. Insulating Military Commissions From Habeas Review Itself Violates International Law 8

B. Insulating Military Commissions From Habeas Review Would Allow Further Violations Of International Law 12

1. Violation Of Speedy Trial Rights 12

2. Violations Of Generally Recognized Principles Of Regular Judicial Procedure Secured By Common Article 3 13

CONCLUSION 15

APPENDIX 17

TABLE OF AUTHORITIES

CONSTITUTIONAL AND STATUTORY PROVISIONS

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ..... 1, 2, 13

U.S. CONST. art. I, § 9, cl. 2 9

U.S. CONST. art. VI, cl. 2 9

U.S. CASES

Al Odah v. United States, S. Ct. case No. 06-1196 2

Boumediene v. Bush, S. Ct. case No. 06-1195 2

Ex parte Quirin, 317 U.S. 1 (1942) 7

Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) ..... *passim*

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) 13

Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998) 12

Murray v. The Charming Betsey, 6 U.S. (2 Cranch) 64 (1804) 8, 11

Rasul v. Bush, 542 U.S. 466 (2004) 4

INTERNATIONAL CASES AND OPINIONS

A and Others v. Sec'y of State for the Home Dep't [2005] H.L.L.R. 1 5

Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9 7

Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of Jan. 30, 1987 10

Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of Oct. 6, 1987 10

Inter-American Court of Human Rights, *Case of Neira Alegria and Others*, Judgment of Sept. 19, 1996 10

Sextus v. Trinidad and Tobago, H.R.C. Communication No. 818/1998 (July 16, 2001) 13

U.N. Human Rights Committee, *General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, General Comment No. 29 (Aug. 31, 2001) 10

TREATIES

American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 ..... 9, 12

Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 ..... 8, 10, 13

International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ..... 9, 12

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 ..... 14, 15

Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 9

TREATISES

INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) 10

INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of a group of 411 United Kingdom and European parliamentarians, including 299 current or former Members of the Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland, 111 current or former Members of the European Parliament, and a former Vice President of the European Commission (the "*amici*").[1] The full list of *amici* is attached as an Appendix to this brief.

Amici are drawn from all across Europe, both geographically and politically. The *amicus* group spans the political spectrum, and includes senior figures from all the major political parties in the United Kingdom, including former Cabinet Ministers. The group also includes judges of the highest court in the United Kingdom, senior lawyers, and Bishops of the Church of England.

The same *amicus* group has filed briefs in support of Petitioner Hamdan's previous petitions in this Court. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this Court upheld Hamdan's claims under the Geneva Conventions and Uniform Code of Military Justice ("UCMJ"). Since then, Congress has enacted the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, section 7 of which the courts below interpreted to require dismissal of Petitioner's habeas petitions.

As before, *amici* express no view on whether Petitioner has engaged in acts of terrorism or any conduct in violation of the laws of war, international law more

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored the brief in whole or in part and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

generally, or U.S. law. Nor do *amici* seek to express any view on politics or tactics in the "war on terror" in general. These are questions on which *amici* may hold differing individual views.

Amici have participated in this case from the outset because, despite their divergent political views, they share a common view that it is important to the international legal order that, even when faced with the threat of international terrorism, the United States comply with the standards set by international humanitarian law and human rights law and, fundamentally, with the rule of law itself. *Amici* have previously taken part in these proceedings to urge this Court to ensure that the treatment accorded to prisoners such as Petitioner—innocent until proven guilty, be they ultimately found to be terrorists or not—meet these standards. In particular, *amici* have come together to endorse the view that, even in the face of the terrorist threat, law and in particular international law has scope to operate and acts to prevent the existence of legal "black holes" within which individuals are stripped of fundamental legal protections recognized by all civilized nations and enshrined in international humanitarian and human rights law.

Amici come together again now—in support not only of Petitioner's petition for certiorari in this case, but also of his motion for reconsideration in case No. 06-1169—to urge this Court to act. *Amici* consider that the provisions of the MCA, such as section 7, which purport to interfere with habeas actions brought by an alien "determined by the United States to have been properly detained as an enemy combatant or...awaiting such determination," fundamentally offend the rule of law and contravene treaties by which the United States is bound and upon which it is built.

Amici welcome the Court's recent decision to grant petitions for certiorari in *Boumediene v. Bush*, No. 06-1195, and *Al Odah v. United States*, No. 06-1196, two cases

involving Guantanamo detainees who have not been charged with offenses triable by military commission. *Hamdan* presents substantially the same question as *Boumediene* and *Al Odah*, namely whether detainees at Guantanamo Bay are entitled to rely on the writ of habeas corpus to challenge their continued detention. In addition, *Hamdan* presents a further necessary and indispensable counterpart question: whether Petitioner can rely on the writ to challenge, on a pre-trial basis, the military commission process set up to try him and other detainees at Guantanamo. Therefore, if this Court is to hear *Boumediene* and *Al Odah*, it should hear *Hamdan* as well. The fundamental rights enjoyed by Petitioner extend to all held in detention by the United States, at Guantanamo and elsewhere. Accordingly, the Court should hear Petitioner's case to ensure uniformity of treatment of detainees and uniform compliance with international law.

The writ of habeas corpus has from the days of King John been fundamental to any valid concept of liberty. It is the cornerstone of "government of laws and not of men." Building on this ancient foundation, international human rights treaties to which the United States is party enshrine the right of detainees to test the lawfulness of their detention in a court of law. Were the MCA to be found to deny this right to detainees such as Petitioner, this would be incompatible with the rule of law and with the United States' international legal obligations.

Moreover, insulating the military commission process from habeas review, which is the effect of the decisions below, would expose Petitioner to further violations of his human rights and would be inconsistent with the United States' international legal obligations. For a state such as the United States to persist in conduct that defies international law does incalculable violence to the rule of law and to the vitality of international human rights and humanitarian law—binding legal norms that reflect the very principles that

differentiate the peoples of civilized nations from those who acquiesce in unlawful acts of terror.

The outcome of this case is of course of enormous personal significance for Petitioner. The rulings of this Court in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), reasserted the rule of law and constrained not the Government's conduct of the war on terror but only its efforts to cast individuals detained at Guantanamo Bay out of the reach of legal protection into a legal "black hole." The MCA and the decisions below threaten to undo those rulings and to deprive Petitioner and other detainees of that most fundamental touchstone of liberty, the writ of habeas corpus. Absent this touchstone, Petitioner has no means to vindicate his well founded claims that trial by military commission would violate his fundamental rights.

Each member of the *amicus* group has been privileged to serve a state committed to the rule of law, and each has an interest in seeing the rule of law upheld. Insofar as the provisions of the MCA that purport to insulate the military commissions from habeas review stand, the United States will in effect have declared that the fundamental principle of the rule of law upon which this nation was built is set aside in the face of a terrorist threat. That would bode ill for the future of all liberal democracies and the efforts of the community of liberal democracies to encourage and enforce respect for international human rights and humanitarian norms and the rule of law around the world. Accordingly, *amici* urge this Court, with the eyes of the world now turned toward it, to grant the Petition and affirm that the United States will not sacrifice the integrity of its legal system and the values which it espouses and holds dear to the terrorist threat.

To paraphrase Lord Hoffman's speech in the House of Lords, describing the stark choice the Government of the

United Kingdom faced when deciding on rules for the detention of terrorist suspects: "The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for [this Court] to decide whether to give the terrorists such a victory." *A and Others v. Secretary of State for the Home Department* [2005] H.L.L.R. 1, 53 (per Lord Hoffman).

SUMMARY OF ARGUMENT

Amici believe that (i) the gravity of the issues involved, issues which concern not only the parties but all nations and most particularly those who share the commitment of the United States to the rule of law and (ii) the need to halt violations of international law by the United States require that the Petition be granted and the case be heard by this Court on an expedited basis.

ARGUMENT

I. The Interests Of All Parties And The Wider World Are Served By An Expeditious And Definitive Resolution Of The Important Questions Presented In This Case.

Amici appreciate that the procedure contemplated in the Petition is extraordinary and that the Court has already denied certiorari before judgment in this case once before.[2]

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[2] Since that denial of certiorari, however, there have been a number of developments that increase the urgency of the need for guidance from this Court. For example, *amici* note that the military commission proceedings against Petitioner have collapsed because the Combatant Status Review Tribunal process did not make the determination required under the MCA that Petitioner is an *unlawful*

However, the circumstances of this case and the significance of the legal questions presented are also extraordinary. Without doubt, the matters raised are of imperative public importance and merit immediate determination by this Court.

Granting the Petition at this stage will serve the interests of all parties. Petitioner is crucially concerned with ensuring the legitimacy of any process to which he will be subject. The judgments below effectively deny him any forum in which to do so. Unless this Court acts to ensure that Petitioner may be heard, he will face prosecution in a process which both the international community and history may ultimately regard as unjust and unworthy of the United States' long commitment to human rights and the rule of law.

For this reason, the interests of the United States will also be served by this Court granting the Petition: Until Petitioner's challenge to the legality of the military commission process is heard and resolved in regularly constituted courts of law, the legitimacy of that process will continue to be questioned, as will the commitment of the United States to the rule of law. The decisions below threaten to bar any consideration of Petitioner's well-founded allegations that the military commission process denies him fundamental rights that are secured by, among other things, treaties to which the United States is party and by which it is bound.

Indeed, Petitioner's own case, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), firmly underscores the need for immediate, pre-trial, review to test the legitimacy of the military commission process. Had this Court not granted certiorari in that case, but instead accepted the government's position that review of the military commission process

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enemy combatant, rendering the commission constituted under the MCA without jurisdiction.

should be permitted only after the commissions had been held, Petitioner—together with numerous other detainees—would have been subjected to trials, and perhaps convictions resulting from those trials, which did not offer many of the fundamental protections enshrined in international law. Those trials would then undoubtedly have been open to the same objections as were recognized and accepted by this Court in its ruling of June 2006.

The significance of the issues raised is not restricted to the national level. Habeas corpus and the commitment to the rule of law and fundamental principles of liberty that it reflects are the common heritage of civilized nations. The writ itself pre-existed the United States, and it is embodied in the national law of countless countries and, importantly, in multiple international human rights treaties by which the United States is bound. The Supreme Court of Canada recently reaffirmed the enduring importance of habeas corpus to civilized nations. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9. For these reasons, this Court's ruling on the scope of habeas jurisdiction will resound within legal systems worldwide, both national and international. And any deviation from the liberty and rule of law values enshrined in the Great Writ would pose a challenge to efforts by the community of liberal democracies to encourage and enforce commitment to due process and the rule of law around the world.

Amici recall that this Court has granted certiorari before judgment in the past where cases of such exceptional importance have come before it. The case for certiorari before judgment here is at least as strong as, if not stronger than, it was in *Ex parte Quirin*, 317 U.S. 1, 19 (1942), where this Court granted certiorari before judgment "[i]n view of the public importance of the questions raised...and because in [the Court's] opinion the public interest required that [the Court] consider and decide those questions without any

avoidable delay." This is a case which has serious and urgent implications for Petitioner, the United States and the international community more generally. In light of the extraordinary circumstances of this case and the significance of the legal questions presented, *amici* urge the Court to grant the Petition.

II. Granting The Petition Is Necessary To Prevent Violations Of International Law.

A further imperative is for the United States to come back into compliance with its binding obligations under international law. The MCA, both in its "jurisdiction-stripping" provisions and its provisions relating to the military commission process, violates international law in that it denies to Petitioner fundamental rights secured by international human rights treaties and Common Article 3 of the Geneva Conventions of 1949, by which the United States is bound. The Court can avoid this violation by granting the Petition and interpreting the MCA consistently with international law, *cf. Murray v. The Charming Betsey*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"), or invalidating those aspects of the statute that contravene international law.

A. Insulating Military Commissions From Habeas Review Itself Violates International Law.

Were the Government to succeed in denying the jurisdiction of the courts even to hear claims concerning the legality of continued detention and the military commission process to which Petitioner is to be subjected, this would directly conflict with the clear and well settled principle of international human rights law, by which the United States is bound, that a detainee has the right to challenge the legality of his detention in court. This Court should grant the Petition

in order to prevent this violation of international law by the United States.

The fundamental right of an individual detained by authority of a state to challenge the legality of his detention is enshrined in numerous instruments of international law that bind the United States, including:

(1) Article 9(4) of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ("ICCPR"): "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful"; and

(2) Article 7(6) of the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 ("ACHR"): "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful."

The United States has ratified the ICCPR and is therefore bound by its terms. *See* U.S. CONST. art. VI, cl. 2. Although the United States has not ratified the ACHR, it has signed it and is therefore bound not to defeat its object and purpose and must avoid taking any action that is inconsistent with the rights set out therein. *See* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

The right articulated in article 9(4) of the ICCPR and article 7(6) of the ACHR has its origins in the Anglo-American writ of habeas corpus; these treaty provisions mirror in international law the protections enshrined in national law provisions, including the provisions of article I, section 9, clause 2 of the United States Constitution. The obligation to provide a person deprived of liberty with an

opportunity to challenge the lawfulness of detention (described by scholars of international law as the right of habeas corpus) is also recognized as an aspect of the customary international law of war. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 349-52 (2005).

As such, the right to challenge the legality of detention is one of the most fundamental of the "judicial guarantees which are recognized as indispensable by civilized people" referred to in Common Article 3 of the 1949 Geneva Conventions. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364. Indeed, although some of the rights protected by international law may be derogated from in time of war or emergency, international tribunals charged with the application and implementation of international human rights treaties concur that this particular right cannot be made to yield. *See* Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of Jan. 30, 1987, *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_08_ing.doc; Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of Oct. 6, 1987, *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_09_ing.doc; Inter-American Court of Human Rights, *Case of Neira Alegria and Others*, Judgment of Sept. 19, 1996, *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_29_ing.doc (characterizing the writ of habeas corpus as among those judicial remedies that are "essential" for the protection of fundamental rights that persist in times of war or emergency). *See also* U.N. Human Rights Committee, *General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, General Comment No. 29 (Aug. 31, 2001), *available at* http://www.ohchr.org/english/bodies/hrc/comments.htm

("[I]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.").

This Court has already recognized that the protections of Common Article 3 apply to Petitioner Hamdan (and others in his position). *See Hamdan*, 126 S. Ct. at 2795-96 (concluding that "Common Article 3...is applicable here and...requires that Hamdan be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples'"); *id.* at 2802 (Kennedy, J., concurring) (describing Common Article 3 as "one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan and, as a result, to the use of a military commission to try Hamdan" and observing that this "provision is part of a treaty the United States has ratified and thus accepted as binding law"). The strictures of the ICCPR and the ACHR, as well as customary international law, also oblige the United States to provide Petitioner with means of challenging the legality of his detention.

In the law of the United States, the means by which individuals detained by the power of the state vindicate this right has been through the mechanism of habeas corpus. The District Court found that, pursuant to the MCA, the writ of habeas corpus is not available to Petitioner to challenge the legality of his detention. Accordingly, the effect of the judgments below is to deny Petitioner's fundamental human rights, rights which the United States has pledged itself to uphold and is legally bound to secure. The Court can and should prevent this violation of international law, *cf. The Charming Betsey*, 6 U.S. (2 Cranch) at 118, by granting the Petition and reaffirming Petitioner's access to the writ of habeas corpus.

B. Insulating Military Commissions From Habeas Review Would Allow Further Violations Of International Law.

The treatment of Petitioner and others detained at Guantanamo Bay (and elsewhere), to date and under the MCA, deviates from the most basic and fundamental norms of procedural fairness, respect for liberty and due process that are recognized in international law. The Court should grant the Petition in order to enable meaningful judicial scrutiny of the military commission process and to halt these violations.

1. Violation Of Speedy Trial Rights

Chief among the violations of Petitioner's rights is the denial of a speedy trial to resolve the allegations belatedly made against them. The right to a speedy trial, which is a fundamental component of the right to a fair trial, is enshrined in numerous instruments of international law, including:

(1) Article 9(3) of the ICCPR, which states that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release"; and

(2) Article 7(5) of the ACHR, which provides that "any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings".

Accordingly, U.S. courts recognize the right to a speedy trial, as protected by international law. In *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998), citing the Restatement (Third) of the Foreign Relations Law

of the United States and various international instruments, including the ICCPR, the Court of Appeals held that "there is a clear international prohibition against arbitrary arrest and detention", and that "detention is arbitrary 'if...the person detained is not brought to trial within a reasonable time'." 141 F.3d at 1384; *accord Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995).

Significantly shorter periods of pre-trial detention than those which Petitioner has endured have been found to violate international law. *See, e.g., Sextus v. Trinidad and Tobago*, H.R.C. Communication No. 818/1998 (July 16, 2001) (holding that a period of twenty-two months' detention violated ICCPR article 9(3)). The United States has not complied with its obligations under the ICCPR or the ACHR by holding Petitioner in pre-trial detention for some five years. And the MCA explicitly denies to Petitioner and other detainees the right to a speedy trial. *See* MCA, *supra*, § 3(a) (disapplying provisions of UCMJ relating to speedy trial to trial by military commission).

2. Violations Of Generally Recognized Principles Of Regular Judicial Procedure Secured By Common Article 3

Petitioner's claims that military commissions will not provide a process that meets basic standards of fairness and due process are well founded. In at least two respects, the military commission process under the MCA will deny Petitioner the "judicial guarantees which are recognized as indispensable by civilized nations" that are required under Common Article 3.

First, the MCA authorizes military commissions to try Petitioner for the charge of "conspiracy," which is not a recognized violation of the law of war. *See Hamdan*, 126 S. Ct. at 2779 (plurality opinion). In construing the reference in Common Article 3 to "judicial guarantees which are

recognized as indispensable by civilized nations", this Court has found authoritative guidance in Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. As was observed in *Hamdan*:

> this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949.... Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled."

Hamdan, 126 S. Ct. at 2797 (plurality opinion of Stevens, J.) (citation omitted); *see also id.* at 289 (Kennedy, J., concurring) (referring to Article 75). One of these fundamental safeguards is the principle that "No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed." *See* Protocol I, *supra*, art. 75(4)(c). Accordingly, trying Petitioner for conspiracy under an *ex post facto* standard violates the "judicial guarantees" secured by Common Article 3.

Second, the MCA authorizes military commissions to convict Petitioner on the basis of any evidence, even hearsay evidence, that is deemed "reliable" and "probative." Yet Petitioner is not entitled to discover information about the

sources of this information or the methods—including cruel, inhuman or degrading treatment just short of torture, which will not result in the exclusion of evidence—by which it was obtained. A similar feature of the military commissions' structure at issue in Hamdan's previous petition to this Court was described by the Court as a "striking feature" of the ways in which the military commission process deviated from normal procedure, *Hamdan*, 126 S. Ct. at 2786, and it certainly will materially prejudice Petitioner's ability to defend himself in military commission proceedings. For this reason, the military commission process fails to "afford the accused before and during his trial all reasonable rights and means of defense," as is required by article 75(4)(a) of Protocol I, and to secure to Petitioner "the right to examine, or have examined, the witnesses against him," recognized in article 75(4)(g) of Protocol I.

For these reasons, the MCA removes the "judicial guarantees which are recognized as indispensable by civilized nations" as is required by Common Article 3, the international legal standard which this Court has already said applies to Petitioner's treatment and trial by military commission. In these circumstances, the Court should grant the Petition and keep the doors of the courts open to Petitioner. This is the only way to vindicate the rights guaranteed to Petitioner under international law and the only way to ensure that the military commission process will comply with the United States' international legal obligations.

CONCLUSION

As the Government of the United States has itself so often stated, the war on terror is an epic struggle between lawless forces who deny our common humanity and who disregard the most basic rules of civilized behavior and the rest of the world—committed to liberty, equality before the

law and the rule of law. This struggle surfaces in the "jurisdiction-stripping" provisions of the MCA, and their assault on the rule of law. The Court should grant the Petition—as it has in *Boumediene* and *Al Odah*—in order to continue in the direction it has taken in *Rasul* and *Hamdan*: to prevent the creation of a legal "black hole"; to counter the isolation of individuals detained at Guantanamo Bay from legal protection and their treatment from legal scrutiny; and to ensure that the standards that the United States and its legal system uphold are extended, as they are required under international law to be, to all people under the control of the United States. In so doing, the Court can reinforce human rights and the rule of law, ensure compliance with the international legal obligations of the United States, and do great service to the authority of international law generally and, specifically, to the liberal principles upon which the world's democratic states are founded.

Respectfully submitted,

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July 20, 2007

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APPENDIX

LIST OF AMICI

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